# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1962

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## No. 53

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## GEORGE D. KER, ET AL., PETITIONERS,

vs.

## CALIFORNIA

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ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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[fol. 1]

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.**

S. C. No. 231976

D. A. No. 284830

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

GEORGE D. KER and DIANE K. KER, Defendant

INFORMATION—Filed August 16, 1960

Vio. Sec. 11500, H. & S. Code 11530.

The said GEORGE D. KER and DIANE K. KER are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 11530, Health and Safety Code, a felony, committed as follows: That the said GEORGE D. KER and DIANE K. KER on or about the 27th of July, 1960 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously have in their possession a narcotic, to wit, Marijuana.

William B. McKesson, District Attorney for the County of Los Angeles, State of California, By Raymond L. Millard, Deputy. L. Raymond Millard,

[File endorsement omitted.]

[fol. 2] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST B

Present Hon. EDWARD R. BRAND Judge

MINUTES—August 19, 1960

Deputy District Attorney J Chandler and the Defendants with counsel, Anthony Paonessa, present. Each: Arraigned. Pleads "Not Guilty". Waives time. Set for trial on October 24, 1960, 9:00 A M in department West A. Bail.

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[fol. 3] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST A

Present Hon. ORLANDO H. RHODES Judge

MINUTES—October 24, 1960

Deputy District Attorney R Corn and Defendants with counsel, Anthony Paonessa, present. Each: Transferred to Department West B for trial. Remains on bail.

[fol. 4] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 24, 1960

Cause is called for trial. Deputy District Attorney R Corn and the Defendants with counsel, Anthony Paonessa, present. By order of Court, the following jurors are impaneled and sworn to try the cause:

| | |
|---|---|
| Mrs Jeane F Gradwohl | Mrs Flora T Leserman |
| Mrs Ruth H Wilkie | Mrs Mary V Lattimer |
| Mrs Anne Mattox | Mrs Madeline B Current |
| Mrs Hetty P Haeggquist | Joseph E Schultz |
| Mrs Mary Smith | Mrs Ora W Stair |
| Mrs Barbara P Sinay | Mrs Evelyn M Loether |

It appearing to the Court that this may be a prolonged trial, the Court orders that an alternate juror be selected. Mrs Edith M Hendrickson is sworn as an alternate juror. It appearing to the Court that juror Mrs Barbara P Sinay is unable to be present for the remainder of the trial due to medical appointments, she is excused. The alternate juror is sworn to try the cause in place of the excused juror. Out of the presence of the jury, defendants move for a dismissal under Section 995 Penal Code and the following persons are sworn and testify therefore: Dennis A Cook, Elvis A Warthen and Leo Berman are sworn and testify for the People. Robert J Black is sworn and testifies for defendants. The motion is denied. The jury is admonished and trial is continued to October 25, 1960, 10 A M. Defendants to remain on bail.

[fol. 5] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 25, 1960

Trial, continued from October 25, 1960, resumes, with the Jurors present as heretofore. Deputy District Attorney R Corn and Defendants with counsel, Anthony Paonessa, present. John Wieland, Leo Berman and Elvis Warthen are sworn and testify for the People. People's Exhibits #1 (Brown manila envelope containing green leafy substance), #2 (Large manila envelope containing a shopping bag, white paper box, eye dropper and green plastic vial) and #3 (Brown manila envelope containing paper towel with seeds and cello lunch bag containing leafy substance) are admitted in evidence and filed. People rest. Defendants make opening statement. George D Ker, George R Ker, Diane K Ker, Veva Ker and Bernice Footitt are sworn and testify for the defendants. Defendants' Exhibit A (7 Photos) is admitted in evidence and filed. The Jury is admonished and trial is continued to October 26, 1960 at 10:00 A M. Each defendant remains on bail.

[fol. 6] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 26, 1960

Trial resumes with jurors present as before. Deputy District Attorney R Corn and the Defendant with counsel, Anthony Paonessa, present. Donald Besewick is sworn and testifies for the defendants. George D Ker is recalled and testifies for the defendants. Defendants rest. Don L. Keith and Marvin J Markman are sworn and testify for the People in rebuttal. Elvis A Warthan and Leo Berman are recalled and testify for the People in rebuttal. Both sides rest. Cause is argued. The jury is partially instructed. Jury is admonished and trial is continued to October 27, 1960, 9:45 A M. Defendants remain on bail.

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[fol. 7] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 27, 1960

Trial, continued from October 26, 1960, resumes, with the Jurors present as heretofore. Deputy District Attorney R Corn and Defendants with counsel, Anthony Pao-

nessa, present. The Court completes instructing the Jury; the Sheriff is sworn to take charge of the Jury; and at 9:50 A.M. the Jury retires to deliberate. At 11:15 A M, the Jury returns into court with the following verdicts:

Title of Court and Cause

"We, the Jury in the above entitled action, find the Defendant Diane K Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information. This 27 day of October, 1960. (Mrs) Edith M Hendrickson, Foreman"

"We, the Jury in the above entitled action, find the Defendant George D Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information. This 27 day of October, 1960. (Mrs) Edith M Hendrickson, Foreman"

Polling of the Jury is waived. Re-reading of the verdicts, as recorded, is waived. The Jury is discharged. The used and unused verdicts, instructions given and refused, are filed. Defendants, personally, waive time for sentencing and ask leave to file a written application for probation. Permission is granted to each defendant. Further proceedings are set for December 9, 1960 at 9:00 A M, Department West D. Each defendant is to remain on bail.

[fol. 8] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

*DIANE K. KER, Defendant.*

Dept. WE D, Santa Monica

VERDICT (GUILTY)—October 27, 1960

We, the Jury in the above entitled action, find the Defendant Diane K. Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information.

This day of Oct. 27, 1960.

(Mrs.) Edith M. Hendrickson, Foreman.

Verdict (Guilty)..

[fol. 9] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, Defendant.

Dept. WE D, Santa Monica

VERDICT (GUILTY)—October 27, 1960

We, the Jury in the above entitled action, find the Defendant George D. Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information.

This 27 day of Oct. 1960.

(Mrs.) Edith M. Hendrickson, Foreman.

Verdict (Guilty).

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[fol. 10] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—November 28, 1960

Further proceedings is advanced to this date from December 9, 1960, transferred to Department 60 and continued to December 9, 1960, 9 A M.

[fol. 11] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

GEORGE D KER

Department No. 60.

Present Hon. BENJAMIN LANDIS Judge

JUDGMENT—December 9, 1960

Defendant with counsel, A Paonessa, present. On motion of defendant, Al Matthews and Robert Stanley, Robert Stanley being present, are substituted as attorneys of record in place and stead of A Paonessa. Defendant's motion for continuance is denied. Defendant's motion for a new trial is denied. Bail exonerated. Notice of appeal having been filed, the Court grants a stay of execution pending appeal and sets bail on appeal at $2500. plus 5% penalty assessment. Probation denied. Sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of Violation of Section 11530, Health and Safety Code, a felony, as charged in the information.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

[fol. 12] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

DIANE K KER, Defendant.

Present Hon. BENJAMIN LANDIS Judge

Department No. 60

JUDGMENT—December 9, 1960

Defendant with counsel, A Paonessa, present. On motion of defendant, Al Matthews and Robert Stanley, Robert Stanley being present, are substituted as attorneys of record in place and stead of A Paonessa. Defendant's motion for continuance is denied. Defendant's motion for a new trial is denied. Bail exonerated. Notice of appeal having been filed, the Court grants a stay of execution pending appeal and sets bail on appeal at $1,500. plus 5% penalty assessment. Sentenced as indicated, suspended. Probation granted for five years.

☒ Spend first 6 months in County Jail.

☒ Road Camp or Honor Farm Recommended.

☒ Good time allowed if earned.

☐ Pay fine of $ through Probation Officer in such manner as such officer shall prescribe.

☐ Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.

☐ Pay any judgment arising out of this matter, when it becomes final in such amounts and manner as Probation Officer shall prescribe.

☐ Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.

☒ Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.

☒ Not associate with known narcotic users or sellers.

☐ Have no blank checks in possession, not write any por-

tion of any checks, not have bank account upon which may draw checks.

☐ Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.

☐ Not associate with——

☐ Stay out of places where homosexuals congregate.

☐ Not associate with children under 14 years except in presence of responsible adults.

☒ Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.

☒ Seek and maintain employment as approved by Probation Officer.

☐ Support dependents.

☒ Maintain residence as approved by Probation Officer.

☐ Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.

☒ Obey all laws, orders, rules and regulations of Probation Department and of the Court.

Whereas the said defendant having been duly found guilty in this court of the crime of Violation of Section 11530, Health and Safety Code, a felony, as charged in the information.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the California Institution for Women for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles.

[fol. 13] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231 976

[Title omitted]

NOTICE OF APPEAL—Filed December 9, 1960

Notice Is Hereby Given that the defendants above named, George D. Ker and Diane K. Ker, hereby appeal from the judgment of the above entitled Court in Department 60 thereof, the Honorable Benjamin Landis, Judge Presiding, and from the denial of the motion for a new trial, rendered on the 9th day of December, 1960.

Notice Is Further Given to the Clerk of the above entitled Court to cause the preparation of the Clerk's transcript on appeal and to cause the preparation of the Reporter's Transcript of the oral proceedings at the trial herein.

Pending determination of this appeal, it is requested that execution of the judgment herein be stayed and that the defendants be admitted to reasonable bail.

Dated: December 9th, 1960.

Matthews and Stanley, By Robert W. Stanley.

[fol. 14] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

No. 231 976

ORDER STAYING EXECUTION AND FIXING BAIL ON APPEAL—December 9, 1960

It appearing that the defendants, George D. Ker and Diane K. Ker, have filed a Notice of Appeal from the judgment of the above entitled Court, and good cause appearing therefor,

It Is Hereby Ordered that the execution of the judgment heretofore rendered in the above entitled matter be stayed pending the determination of the appeal herein.

It Is Further Ordered that bond on appeal be set at $2,500.00, for George D. Ker, and at $1,500.00, for Diane K. Ker.

Dated: December 9, 1960.

Benjamin Landis, Judge Presiding.

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[fol. 15] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-2] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231,976

Department Santa Monica "D"

Hon. Benjamin Landis, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

DIANE K. KER and GEORGE D. KER, Defendants.

**Reporter's Transcript on Appeal**

October 24, 1960
October 25, 1960
October 26, 1960
October 27, 1960
December 9, 1960

APPEARANCES:

For the People: WILLIAM B. McKESSON, District Attorney, By: ROBERT S. CORN, Deputy, 600 Hall of Justice, Los Angeles, California.

For Defendants: ANTHONY W. PAONESSA, Esq., 513 East Manchester, Inglewood, California.

[fol. 3] Santa Monica, California, October 24, 1960, 9:30 A.M.

COLLOQUY BETWEEN COURT AND COUNSEL.

The Court: Good morning.

People versus Ker.

Mr. Corn: Ready, your Honor.

Mr. Paonessa: Ready, your Honor.

The Court: Call a jury.

(Whereupon the prospective jurors were sworn to try the cause.)

(Whereupon a jury were empaneled.)

The Court: May we have a stipulation that it won't be necessary for the Court to admonish the jury at each session?

Mr. Paonessa: Yes.

Mr. Corn: Yes.

The Court: Is it stipulated the jurors will be considered in their proper places unless called to the attention of the Court?

Mr. Corn: So stipulated.

Mr. Paonessa: So stipulated.

The Court: Will it be stipulated the defendants will be considered present, here represented by counsel, unless the Court's attention is directed they are not here?

Mr. Paonessa: Yes.

Mr. Corn: Yes.

(Whereupon the noon recess was taken at 12:00 noon.)

[fol. 4] SANTA MONICA, CALIFORNIA, OCTOBER 24, 1960, 2:00 P.M.

The Court: Ladies and gentlemen of the jury, counsel informs me that this case is going to take about four days. I understand someone here has doctor problems.

A Juror: Yes, that is me.

The Court: What is your problem?

A Juror: I have some standing appointments four days a week and I wasn't aware of the fact I would be required to spend so much time on each case.

The Court: Very well, we will select some alternate. Do you want to say something?

Mr. Paonessa: No.

The Court: All right, call the jury, and the jurors that are called, will you just sit there.

(Whereupon an alternate juror was empaneled.)

The Court: Very well, now, I understand your name is Mrs. Sinay.

The Juror: Sinay.

The Court: And you cannot serve as a juror because of the doctor's appointments?

The Juror: That is correct.

The Court: Very well, we will use the alternate. You will be excused.

You may take her place.

[fol. 5] (Whereupon the alternate juror is sworn.)

The Court: Very well, ladies and gentlemen, I have some good news for you. You will have another recess. We have some legal problems to discuss so you will please return to your jury room.

(Whereupon the jury returns to the jury room.)

The Court: All right, let us proceed.

Mr. Corn: If it please the Court, I don't believe the motion has been made on direct examination by counsel.

Mr. Paonessa: Yes, well, for the purpose of the record then, I move that the probable cause hearing be conducted outside of the presence of the jury.

The Court: Very well, the jury is not here, we will do that.

Mr. Corn: I understand the Court wants me to put Officer——

The Court: I cannot hear you.

Mr. Corn: The Court wishes I place my officers on the stand to show there was probable cause.

The Court: Correct.

(Evidence concerning probable cause.)

Mr. Corn: Sergeant Cook.

[fol. 6] DENNIS A. COOK, called as a witness on behalf of the People, having been duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name.

The Witness: Dennis A. Cook.

Direct examination.

By Mr. Corn:

Q. Sergeant Cook, is it not?

A. Yes, it is.

Q. And you are a Los Angeles County Deputy Sheriff attached to the Narcotics Detail?

A. Yes, sir, that's correct.

Q. Now, were you employed as a Deputy Sheriff attached to that Detail on the 25th and 26th of July of 1960?

A. Yes, sir, I was.

Q. And did you have any narcotic transaction with any individuals on the 25th of July——

A. Yes, sir, I did.

Q. —1960? Will you please tell the Court what happened?

A. Yes, sir, on the 25th day of July this year at approximately 8:25 p.m., I purchased approximately 17 milligrains of heroin from a Mr. William Terrhagen.

[fol. 7] Q. That was purchased with the County funds?

A. Yes, sir, that's correct.

Q. Pursuant to a narcotics investigation?

A. That is correct.

Q. Will you please tell the Court how this purchase occurred?

A. Yes, sir. On that date I was introduced to Mr. Terrhagen by a confidential informant. I spoke with him, made arrangements to purchase one pound of marijuana. Those arrangements were made at Mr. Terrhagen's home, 14832 South Normandie Avenue.

The Court: What is the name, Terrhagen? Spell that.

The Witness: T-e—I believe it is double r—h-a-g-e-n.

The Court: Go on.

The Witness: And he at that time directed myself and this informant to go to Lou's Barbeque, which is on Rose-

crans Avenue in Gardena, I'd say approximately a hundred yards west of Normandie. We went and waited in the parking area at that location and at approximately 8:20 p.m. Terrhagen arrived. I talked to him. He told me that he couldn't get a hold of the connection at that time but he could get the Marijuana for me later. I then had a conversation with him about Heroin. He said, yes, he could [fol. 8] give me some right then and produced a package from his trouser pocket. We then talked about quality and I told him to give me a couple of caps' worth because it was loose in a piece of tinfoil. He then seated himself in his vehicle, took a small pocket knife out and dug out a small portion of Heroin which was in a powder state, put it in another package and handed it to me and I gave him $6.00 which is what he requested.

By Mr. Corn:

Q. Well, now, did you purchase any other narcotics from Terrhagen or receive any narcotics other than——

A. Yes, sir, on the following day.

Q. Oh, on the following day?

A. Yes.

Q. Will you tell the Court under what circumstances you received those narcotics?

A. Yes, I called Mr. Terrhagen at his home. I called him from the location of Rosecrans and Western Avenues approximately 7:00 p.m. on the following day which was the 26th day of July, this year. I requested at that time that I wanted the pound of Marijuana we had discussed the previous day. He stated for me to wait where I was after I told him that I was at Rosecrans and Western Avenues in Gardena, and he would be right by to pick me up. At this time he came by. I got in his vehicle with him. He then proceeded to the Tropicana Bowling [fol. 9] Lanes, which is, I believe, at 11163 South Prairie Avenue in Inglewood or Lennox areas. At this location he pulled in and parked on the parking area, stated he was to meet his connection in the bowling alley and for me to wait for him. He entered the bowling alley through the restaurant portion and then returned, oh, I guess in about five minutes. He started up his car and as he was starting the car he told me he had talked to his connection. The

connection was waiting for another man that wanted some Marijuana, that he was supposed to meet at this location, and would meet us shortly up by the oil fields by Fairfax and Slauson Avenues. As he started to pull out he pointed to a 1946 De Soto parked two cars east in the parking area, stated that was the connection.

Q. The '46 De Soto was the connection's car, is that what he said?

A. Yes, sir.

Q. And——

A. And made some remarks about a pet bull dog, calling to the dog—calling the name of Abel, telling me that was the dog's name, about the fact it was a fighting dog. As we pulled around in front of this 1946 De Soto I obtained the license number of it, which was JPU-016.

Q. JPU-016?

A. Yes, that's correct.

[fol. 10] Q. This is the 1946 De Soto?

A. Yes, sir.

Q. Did you see the person in the De Soto?

A. There was no one but the dog seated in the car at that time.

Q. What happened then?

A. At that time we went northbound on Prairie, Mr. Terrhagen continued talking about the dog and the fighting of pit bulls. We stopped for gas in a gas station, took us above five minutes, then he proceeded up to Fairfax and there northbound on Fairfax Avenue I'd say approximately 200 yards south of Slauson Avenue, approaching the intersection of Slauson and Fairfax, when I observed this 1946 De Soto that I had seen at the bowling alleys. It was westbound on Slauson and made a turn going northbound on Fairfax ahead of us.

Q. Did you arrange—did you meet this De Soto and stop?

A. Yes, subsequent to that, approximately, oh, I'd say ten minutes later or so, Mr. Terrhagen crossed Slauson and parked, I'd say, less than a quarter mile north of Slauson and Fairfax by some vacant fields and he stated that that was the connection that had turned north on Fairfax, and that he had his supply of narcotics somewhere up in the hills, that he would return and as we were wait-

[fol. 11] ing there, he asked me for the money we had pre-

viously agreed on, a price of $70.00 for one pound of Marijuana. I gave him the money and it was shortly after 8:00 that I observed this 1946 De Soto returning, going southbound on Fairfax. It pulled just past our position, made a U-turn, pulled right up alongside Mr. Terrhagen's car in which Mr. Terrhagen and I were seated, and at this time I observed the driver to be Roland Murphy.

Q. Do you know Roland Murphy?

A. I observed him by mug photographs—I observed on several occasions.

Q. What do you know of Roland Murphy, to your own knowledge, if anything?

A. By information from other members of the Detail I worked on.

Q. What information did you you have with reference to Roland Murphy?

A. That he was engaged in the large scale selling of Marijuana, and that at that time he was out on bail for two other Marijuana cases.

Q. What did Terrhagen and Murphy do at that time, if anything?

A. At that time Mr. Terrhagen had taken the money, the $70.00, from me. He got out of his vehicle and got into the 1946 De Soto with Mr. Murphy and this pit bull dog. They drove again northbound on Fairfax up over [fol. 12] the hill out of my sight, into the oil fields. Then, approximately, oh, I'd say about 10 to 15 minutes later, they returned again, coming southbound on Fairfax. They pulled past my location, made a U-turn and pulled up alongside of Mr. Terrhagen's car in which I was still seated. At that time Mr. Terrhagen got out of Mr. Murphy's car with a kilo flat brick-type package of Marijuana and entered his vehicle. At that time Mr. Murphy drove northbound on Fairfax up toward the oil fields again, out of my sight. We made a U-turn and returned to Mr. Terrhagen's, 14832 South Normandie.

Q. Did you receive this kilo of Marijuana?

A. A portion of it. We went in Mr. Terrhagen's home where he——

Q. Did he make a sale of Marijuana?

A. Yes, sir, he cut out one pound, weighed it and gave me a one-pound portion of it.

Q. Now, you have been on the Narcotics Squad for how long, Officer?

A. Nine years.

Q. Do you know what Marijuana is?

A. Yes, sir.

Q. Was that Marijuana?

A. Yes, sir, it was.

Q. Now, did you convey this information to your brother officers?

A. Yes, I did.

[fol. 13] Q. Which brother officers?

A. Well, to Sergeant Warthen.

Q. Warden?

A. Warthen.

Q. Is that Sergeant Warthen then seated over there in the first row inside the——

A. In the light colored suit, yes, sir.

Q. Who else?

A. Deputy Berman, who is seated at the counsel table, and Deputy White.

Q. Other officers also?

A. Yes, sir.

Q. On what date did you relay this information to Warthen?

A. It was on the date that I made the purchase, on the 26th of July, this year.

Q. You gave him all of the information that you have related to us?

A. Yes, sir.

Mr. Corn: I have no further questions.

Cross-examination.

By Mr. Paonessa:

Q. Officer Cook, when this Mr. Terrhagen led you to Roland Bush and you saw Roland Bush sell him this quantity of Marijuana and these various events that you tes-

[fol. 14] tified to, did you make any move toward arresting Mr. Bush at that time?

A. I am sorry, sir, Mr. Murphy—Roland Murphy.

Q. Mr. Murphy at that time, excuse me.

A. No, sir, I did not at that time.

Q. You didn't make any effort to arrest him at that time.

Did you make any sort of arrangement with him whereby you'd go easy on him and wouldn't arrest him if he'd agree to lead you to some other people who were involved with narcotics?

A. No, sir, I never even had the opportunity of speaking with Mr. Murphy at this point. Closest I had gotten to him when he pulled alongside of Mr. Terrhagen's, and Mr. Terrhagen jumped out and got in with him, then they drove off and returned, and then the same thing happened in reverse.

Mr. Paonessa: I have no further questions of this witness.

The Court: Let us proceed.

Mr. Corn: Elvis Warthen.

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Elvis A. Warthen, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

[fol. 15] The Clerk: Be seated, please. State your full name for the record.

The Witness: Elvis A. Warthen.

The Clerk: Spell your last name, please.

The Witness: W-a-r-t-h-e-n.

Direct examination.

By Mr. Corn:

Q. Now, you also are a Deputy Sheriff of the Los Angeles County attached to the Narcotics Detail?

A. That's correct.

Q. And you were so employed as such on the 25th, 26th, 27th of July of 1960?

A. Yes, sir.

Q. And you have been so employed up to date from those dates, is that correct?

A. Yes, sir.

Q. Did you receive any information from the preceding witness concerning a Roland-Murphy?

A. Yes, sir.

Q. Received information concerning a license number and a car, also, is that correct?

A. I received information concerning it; also I had observed it having been a surveilling officer during all the occasions Sergeant Cook previously related to.

[fol. 16] Q. You observed the occurrence that he just testified to?

A. Yes, sir, I observed the occurrence and I had conversation with him about it after the occurrence.

Q. And did you observe Roland Murphy on any other dates—well, I withdraw that question.

Did you observe him on the 27th of July of 1960?

A. Yes, sir, I did.

Q. Will you please tell us the circumstances under which you observed him then?

A. I first observed him at his home as he was coming out of the house, believe that is 1246 West 139 Street in the City of Gardena. I saw, with Deputy Markman, followed him to the Tropicana Bowling Alley, where he entered. Was inside for, as I recall, approximately 10 minutes. He returned, got back in his automobile, a gray 1946 De Soto, JPU-016. He went north on—on Prairie Avenue from Tropicana Bowling to 102nd Street and west on 102nd. He stopped at a house just before he got to Hawthorne Boulevard. He entered the house, was inside a few minutes, and then proceeded on west to Hawthorne Boulevard and north on Hawthorne Boulevard where I lost sight of his vehicle. I then proceeded to Slauson and Fairfax and north on Fairfax to the top of a hill where Deputy Markman and myself remained in my vehicle until we later observed Roland Murphy drive past us in the [fol. 17] '46 De Soto and into the oil fields.

Q. And what did you observe happen in the oil fields, if anything?

A. I didn't observe anything happen in the oil fields. I observed him drive into the oil fields and prior to his driving into the oil fields, I had observed Mr. Ker seated in his automobile in approximately the same location that I

observed Mr. Terrhagen and Sergeant Cook previously meet with Mr. Roland Murphy.

Q. Mr. Ker in the car?

A. Mr. Ker was in the vehicle at the time I first observed it prior to Roland Murphy's entering the oil fields and when Mr. Murphy returned from the oil fields he stopped immediately behind the vehicle Mr. Ker was seated in. He walked up to the driver's side of the vehicle Mr. Ker was seated in and appeared to have conversation with him. Mr. Ker immediately then drove away, driving south on Slauson and east on Slauson to La Brea, north on La Brea approximately a block. I followed him that distance and he made a U-turn in the middle of the intersection—correction, in the middle of the street between intersections, going north on La Brea and headed back south on La Brea and I lost him right at that time.

Q. Did you take the license number of the vehicle that Mr. Ker was in?

A. Yes, sir, I did.

[fol. 18] Q. Did you make a registration check of that license number?

A. Yes, sir.

Q. And did you—what did you discover?

A. The license was registered to a Douglas Ker at the address 4801 Slauson.

Q. Did you communicate this information that you have just testified about to Deputy Sheriff Berman?

A. I am sorry?

Q. Did you communicate this information to one Deputy Joe Berman?

A. When did I do that?

Q. Yes.

A. It was in the evening, probably 15 to 30 minutes after I had seen the meeting between Mr. Ker and Mr. Murphy.

Q. On the 27th?

A. On the 27th day of July, yes, sir.

**Mr. Corn: I have nothing further.**

Cross-examination.

By Mr. Paonessa:

Q. Well, now, on this evening of the 27th when you were following this Roland Murphy, he was aware that you were following him, was he not?

[fol. 19] A. No, sir, he was not—correction, I don't believe he was.

Q. Isn't it true that either you or Deputy Markman made some deal with him, some arrangement whereby he promised to lead you to some other people that you could arrest for narcotics in exchange for not arresting him?

A. No, sir.

Q. Isn't it true that you actually did arrest this Murphy, you or Markman or one of the other officers arrested Murphy about the 30th of July, isn't that true?

A. I don't know the exact date, but it was approximately that time I participated in an arrest of Roland Murphy, yes, sir.

Q. And isn't it true that there were no charges filed against him as a result of that arrest?

Mr. Corn: That is all immaterial, your Honor, I myself am not aware of anything with reference to Roland Murphy.

The Court: You may answer the question I don't think it makes much difference. You may answer.

The Witness: Would you repeat the question?

Mr. Paonessa: Q. Isn't it true that there were no charges filed against Mr. Murphy as a result of that arrest on or about the 30th of July?

A. That is not true, no sir.

Q. Isn't it true that his bail was exonerated and there were no—nothing was filed against him?

[fol. 20] A. It's my opinion that a Complaint has been filed and it is—the case is still pending. I did not personally file the case, however.

Q. You didn't file any charges against him yourself, though?

A. No, sir.

Q. Now, prior to the time you claim you saw Mr. Ker

at the intersection, well, near Slauson and Fairfax, you had never seen him before, had you?

A. No, sir, as far as I know I had never seen him before.

Q. And when you saw him on that occasion you didn't recognize him at all, did you?

A. No, sir, I did not.

Q. What was the license number of the car you saw on that occasion you claim Mr. Ker was riding in?

A. At this time I don't recall, sir.

Q. What kind of a car was it?

A. It was a club coupe—Chrysler product—about a '46, I believe it was a Dodge, possibly De Soto.

Q. Do you recall how Mr. Ker was dressed on that occasion?

A. No, sir, I do not.

Q. What color was the car?

A. Gray or tan. I am not sure of the exact color.

[fol. 21] Q. Did you make a note of the license number?

A. Yes, sir, I did.

Q. Is that available to you now?

A. I believe it's possibly in the notebook I have in my pocket. I am not sure.

Q. Would you look and see if the license number is there?

A. No, sir, I don't appear to have it in this notebook.

Q. It's true that you never had that license number, isn't it?

A. No, sir, it is not. I wrote down the license number. I ran the license number to determine who owned the vehicle.

Q. The truth is that you actually found Mr. Ker's address through another person, another person informed you of that address, isn't it——

Mr. Corn: Objection, argumentative.

The Court: He can answer if it is true or isn't true.

The Witness: I first observed the address together with the identity of the person through the Department of Motor Vehicles, and later also had the address confirmed through another person.

By Mr. Paonessa:

Q. Isn't it true that this Roland Murphy was the first [fol. 22] one who told you of Doug Ker and his address?

A. No, sir.

Q. Now, you say you participated in an arrest of Roland Murphy with some other officers on or about the 30th of July of this year. Who were those other officers?

A. I believe Officer Goodwin, John White. There were other officers there at the time. I don't recall for sure who was at the immediate location.

Q. Officer Goodwin and Officer White are the only ones you recall now?

A. I know they were on the immediate scene. There were several other officers. Officer Berman and Officer Cook, I know, were in the immediate vicinity. I don't believe they were at the location at the time of the arrest, however, as I recall.

Q. Is Officer Goodwin and Officer White present in Court today?

A. No, they are not.

Q. When you ran a check on Mr. Ker's car, what was the full name that it was in the register?

A. I don't know for sure, sir.

Q. Didn't you make any notes of that, to whom it was registered?

A. I don't find my notes regarding any of that. I evidently don't have them with me at this time.

Q. Now, when you saw Mr. Murphy meet this car, you [fol. 23] claim Mr. Ker was in, did you see anyone else in the car that you say Mr. Ker was in?

A. No, sir, I did not.

Q. Did you see anything pass between Mr. Murphy and Mr. Ker at that time?

A. No, sir.

Q. Did you hear any of the conversation between the two?

A. No, sir.

Q. Approximately how far were you away from the car of Mr. Ker at that time?

A. I was approximately a thousand feet away at the time that Mr. Murphy pulled up behind the car. I drove past the car, past the two vehicles to Slauson where I made

a U-turn and pulled into a parking lot to continue observing. Again, I was approximately a thousand feet away on the other side.

Q. And what time of night was it that this took place when you observed Mr. Ker, Mr. Murphy approach this car you claim Mr. Ker was in?

A. As I recall, it was about 8:00 o'clock.

Q. Was the place well-lighted, or was it pretty dark?

A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall. [fol. 24] Q. And did you actually see—I mean, I withdraw that, excuse me.

Did you actually recognize the person who was in the car that Mr. Murphy approached as the defendant sitting with me at the counsel table, Mr. Douglas Ker? Did you actually recognize that person at that time?

A. I didn't know Mr. Ker at that time. I observed him well enough to where I could identify him as the person seated next to you now.

By Mr. Paonessa:

Q. I have no further questions of this witness.

The Court: Let us proceed. Step down.

Mr. Corn: No further questions.

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Leo Berman, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name.

The Witness: Leo Berman.

The Clerk: Spell your last name, please.

The Witness: B-e-r-m-a-n.

[fol. 25] Direct examination.

By Mr. Corn:

Q. You are a Deputy Sheriff of Los Angeles County attached to the Narcotics Detail?

A. I am.

Q. And you are one of the arresting officers in this case?

A. I am.

Q. Do you know whether or not any Complaint has been filed against Roland Murphy, the person referred to in the preceding testimony.

A. There has been.

Q. Where?

A. In the United States Federal Court on three counts as conspiracy to violate the Federal Narcotics Laws.

Q. When was that—that was—that information—strike that.

Do you know when that Complaint was filed?

A. After his arrest on or about the 30th of July.

Q. Now, Mr.—Sergeant—or Deputy?

A. Deputy.

Q. Deputy Berman, you received information from Sergeant Cook and Deputy Warthen concerning Mr. Ker, did you not?

A. I did.

[fol. 26] Q. And was that the information that they referred to in their testimony on the stand?

A. That is correct.

Q. And you received this information on what date?

A. On the date of the arrest, July 27th or—Sergeant Cook's on July 26th and Sergeant Warthen's on July 27, 1960.

Q. And this—you say the information from one of them was on the date of the arrest?

A. That is correct.

Q. And the date of the arrest was on when?

A. The 27th of July, 1960.

Q. This information was received prior to the arrest?

A. That is correct.

Q. Now, and you know Mr. Ker before receiving this information or know of Mr. Ker before receiving this information from either of your two brother officers?

A. I did.

Q. Did you hear about him from anyone else?

A. I did.

Q. Did you hear about him from an informant?

A. I did.

Q. What did you hear about him and when?

[fol. 27] A. My first information pertaining to the defendant Ker was in November of 1959. I received information from various persons, bits of information in regard that he was selling Marijuana from his residence, and that he was possibly securing this Marijuana from Ronnie Murphy who is the alias of Roland Murphy.

Q. That is the same person referred to by the preceding officers?

A. That is correct.

Q. Continue.

A. I subsequently in the early part of 1960 received a mug picture of the defendant, George Ker, from the Inglewood Police Department, and received various bits of information until May, 1960, and between May and July 27 of 1960 I had received information from one Robert J. Black in regard to the activities and trafficking of Marijuana by the defendant, George Ker.

Q. Robert Black?

A. That is correct.

Q. Did Robert Black give you any other information?

A. He had previously, yes, sir.

Q. You have used him in other cases?

A. I used his information in other cases, yes, sir.

Q. Used his information. Is there a distinction between the word "using him" and "using his information"?

[fol. 28] A. Yes, in our work to "use a person" would be to physically use him.

Q. I see. How many times did you use the information of Robert Black before you received information concerning Ker?

A. Prior to the arrest at least three occasions.

Q. And what did this information result in, if anything?

A. In the arrest of two persons on the forgery of checks, one person on a narcotics charge and information pertaining to Mr. Murphy's activities which aided us in the investigation on Mr. Murphy.

Q. Did you have any feeling about the reliability of this Mr. Black?

A. I did not.

Q. Did you have any feeling about the reliability of Mr. Black as an informant?

A. I believed his information was reliable.

Q. Now, pursuant to this information, did you then go to Mr. Ker's apartment?

A. That is correct.

Q. Where was that located?

A. At 41 or—correction—4801 West Slauson Avenue, Apartment 29, Los Angeles.

Q. Tell us the circumstances of the arrest?

[fol. 29] A. We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received a key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthen and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriffs' Narcotics Officers and advised George Ker that we were conducting a narcotics investigation, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were conducting a narcotics investigation.

I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed a brown package that had a small tear in it, a square package, upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds.

Q. Did you know how many cigarettes——

A. Yes, sir.

Q. You have been on the force how long?

A. Three years.

Q. About how many cigarettes could be prepared from two and—how many tenths?

[fol. 30] A. Two and two-tenths pounds. Depending on how it would be rolled, get 40 to 60 cigarettes from ap-

proximately an ounce, so it would be—I'd have to do it with pencil and paper. I believe the Court can draw the proper inferences.

The Court: Let us proceed.

By Mr. Corn:

Q. What happened then?

A. I then advised them that—the defendants that they were under arrest. I asked—I brought them back into the kitchen, showed them the kilo brick, what appeared to be Marijuana. I asked both defendants if it was theirs, and both defendants stated that it was not theirs. I asked defendants——

Mr. Paonessa: Your Honor, aren't we going a little beyond reasonable cause?

The Court: Yes, I think we are. All right.

Mr. Coin: I believe—I submit, your Honor, that from the testimony probable cause has been shown.

The Court: All right. Proceed.

Cross-examination.

By Mr. Paonessa:

Q. Officer Berman, you participated in the arrest of Roland Murphy on July 30, is that not true?

A. That is correct.

Q. And you know of your own knowledge there was no [fol. 31] Complaint filed as a result of that arrest, isn't that true?

A. The Complaint is on file with the U.S.——

Q. But that was as a result of another arrest, was it not?

A. No, it was on the conspiracy charge.

Q. But, as far as anything you had against Mr. Murphy, there was nothing filed at that time, isn't that true?

A. I don't understand your question.

Q. As far as any charges, you didn't press—you yourself didn't press any charges against Roland Murphy as a result of that arrest, did you?

Mr. Corn: If the Court please, this question is unclear because——

The Court: It's unclear and I just don't understand what you are—how is that pertinent to this inquiry of probable cause?

Mr. Paonessa: I am trying to show there was some cooperation between Roland Murphy and these officers, and that Roland Murphy was providing them with certain information, false information, in an attempt to try and save himself.

The Court: Where does the false information come in, when this officer went into these people's home and saw the Marijuana? What is false about that?

[fol. 32] Mr. Paonessa: Well, the fact that he led them to this place on Slauson and La Brea and perhaps cooperated with the police to the extent that even entrapping these defendants.

The Court: Well that theory, you feel, is no probable cause?

Mr. Paonessa: My theory is there is a dispute as to the facts. I intend to dispute the facts of the probable cause.

The Court: Proceed. What is the question that is pending now?

Mr. Paonessa: I merely asked the officer if, as a result of the arrest of Mr. Roland Murphy on or about the 30th of July, 1960, there were any charges filed against Mr. Murphy in the California Courts.

The Court: He testified as far as he knows that is not so, the Federal Courts, is that correct?

The Witness: That is what we filed the case in conjunction with the Federal Bureau of Narcotic Enforcement.

The Court: All right.

By Mr. Paonessa:

Q. Now, you testified that one of your informants in regard to this matter was one Robert J. Black?

A. That is correct.

Q. Just what did he tell you in regard to Mr. Murphy? [fol. 33] What was his statement?

A. In regard to Mr. Murphy, that he had purchased quantities of Marijuana from Mr. Murphy, that Mr. Ker had purchased quantities of Marijuana from Mr. Murphy and other persons had purchased quantities of Marijuana from Mr. Murphy.

Q. And when, approximately, did you last have a conversation with Mr. Black?

A. The exact date I do not recall. I had several conversations with Mr. Murphy.

Mr. Corn: He is answering a non-responsive question, it's Mr. Black.

The Witness: Correct, with Mr. Black. After, I believe, May of 1960, possibly four or five conversations in which the defendant's name had come up and Mr. Murphy's name had come up.

By Mr. Paonessa:

Q. These conversations were with Mr. Black?

A. That is correct.

Q. Who else participated in these conversations?

A. Believe Deputy Joel Lesnick. That is the only officer I can recall other than myself.

Q. What other person other than Mr. Black gave you information as to Mr. Ker's activity, not connected with the Sheriff's Department or——

Mr. Corn: if the Court please, I don't wish to make an [fol. 34] objection at this time or suggest anything to the officer, but I belive the Court should take cognizance of the fact the officer is entitled to refusing to disclose this under 1881.5 CCP upon laying proper foundation.

The Court: Yes, I think so.

By Mr. Paonessa:

Q. Well, Officer Berman, are you aware that I have Mr. Black in jail to testify today and that he is prepared to testify that he never gave you any such information?

Mr. Corn: If the Court please, this is an improper argumentative type of question.

The Court: Sustained.

By Mr. Paonessa:

Q. Does the name Krug ring a bell with you?

A. I do know several Krugs.

Q. Dwayne Krug, do you know a person by the name of Dwayne Krug?

A. I do.

Q. Did he ever provide you with any information?

Mr. Corn: If the Court please——

The Court: Sustained.

Mr. Corn: I make an objection——

The Court: This is on probable cause. I don't know why it is even pertinent.

[fol. 35] Mr. Corn: Again, your Honor, I wish to state that—may I ask the officer some questions on voir dire with reference to 18——

The Court: Yes.

Voir Dire examination

By Mr. Corn:

Q. Have you received information from other informants?

A. I have.

Q. Do you believe that in your knowledge that the liberty, life and welfare of these informants would be endangered?

A. I do.

Q. Do you believe the interests of the State of California would be best protected by the non-disclosure of these names?

A. I do.

Q. Then, do you wish to invoke the People's privilege under 1881.5 of CCP at this time——

A. I do.

Q. —with reference to these other names?

A. I do.

Q. I submit any interrogation with reference to names at this time other than the individuals already in evidence [fol. 36] in an attempt a side door excursion to uncover the informants would be improper.

The Court: Very well. Let us proceed.

Mr. Paonessa: I have no—I would just like to make the statement to the Court that the defense in this action is in the nature that some person, unknown to these defend

ants, planted these things in their apartment, and therefore it is very important that I know the persons who informed on Mr. and Mrs. Ker, in other words, to properly present their defense.

The Court: Well, I think the law is very well established that the witness has a perfect right to not disclose his informants.

Mr. Paonessa: According to the Priestly case, I am entitled to disclosure of the informants and he has disclosed one informant to me who I have examined, and he turns out he denies that he was ever such an informant. Now, I want to know who else these other—what other informants provided this officer with information so I can go into the possibility that they were the ones that framed these defendants.

The Court: In other words, your theory is these informants took this Marijuana found in the apartment, and planted in there?

Mr. Paonessa: Yes, your Honor.

The Court: I think it is a little far-fetched. That is for [fol. 37] the jury to decide, not me. Do you have any comment?

Mr. Corn: Yes, if your Honor wishes comment with reference to this, I'd be happy to state it.

The Court: Yes.

Mr. Corn: The situation, as I understand it, counsel has indicated to the Court that Mr. Black is going to deny that this information was ever given to this officer. This is a matter of credibility of the witnesses which the Court, of course, can determine. The basic purpose of this entire pre-jury hearing is to determine whether or not this officer had in his mind a reasonable suspicion to believe, one, a crime has been committed, and two, these defendants committed this crime. He has testified Mr. Black gave him this information. I submit to the Court notwithstanding Mr. Black's information that the highly involved circumstances, all chain of evidence, concerning the sale of Marijuana in the oil fields or near the oil fields might in and of itself be sufficient, but it is a borderline situation and these officers, not wishing to—having been burdened before with reference to decisions which are contrary to what they have done, which—it to be absolutely sure they

got additional informant and this, together with the other information, I submit to the Court, leaves no room for any doubt as to a reasonable probable suspicion being in the officer's mind.

[fol. 38] The Court: Well, I think this inquiry, as far as probable cause, has gone long enough. I think I am ready to make my ruling. Do your have any—I am sustaining a motion of Mr. Corn as far as asking him any further questions in connection with the informants.

Mr. Paonessa: I'd want to call Mr. Black to the stand to have his testimony in regard to having never had knowledge or informed on either of these defendants, and have the Court's ruling on——

The Court: Let us assume Mr. Black does testify to that. I don't think it would affect any determination as to probable cause in view of the testimony adduced here so far, and I think it would be—use Mr. Black—might as well save him for the trial.

Mr. Paonessa: Well, I merely was contending, your Honor, that if Mr. Black—if it's proven that Mr. Black's testimony is creditable enough to show he was not the informant in this case, that I should be provided with at least one other name.

The Court: Mr. Corn?

Mr. Corn: I have no objection to Mr. Black going on the stand at this time, your Honor. If I might submit to the Court, it might, in fact, be proper to do so to protect the record.

The Court: Very well. I think as far as this witness is concerned, you are finished with him?

[fol. 39] Mr. Paonessa: Yes, I have no further questions.

The Court: All right, you may step down.

Mr. Corn: Thank you, your Honor. We rest with reference to the probable cause issue.

The Court: All right.

Do you want to call Mr. Black?

Mr. Paonessa: Yes, I will call Mr. Black.

The Court: Where is Mr. Black?

Mr. Paonessa: He is——

Mr. Corn: In custody, I understand, your Honor.

The Court: All right.

I was just wondering if we should excuse the jury. It is 3:30 now.

Mr. Corn: It might be judicious.

The Court: You might sit down, Mr. Black.

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ROBERT J. BLACK, called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

The Court: Sit down, Mr. Black. Please call the jury out and I will excuse them.

(Whereupon the jury returns to the courtroom at 3:25 p.m.)

The Court: Members of the jury, the Court has [fol. 40] some additional business which is going to take some time and I thought it would be advisable to have you excused instead of waiting. You are now excused until 10:00 o'clock tomorrow morning. Remember my admonition about not discussing this case with anyone, and you are instructed not to remain in the courtroom. When you leave you are to leave the courtroom and the building. Thank you very much. 10:00 o'clock tomorrow morning.

(Whereupon the jury leaves the courtroom.)

The Court: We will take a five minute recess.

(Whereupon a five minute recess was taken.)

The Court: Proceed.

The Clerk: State your full name for the record.

The Witness: Robert J. Black.

Mr. Paonessa: Your Honor, I would like to address one or two questions to Mr. Black for his own protection because there were some statements made to him, and I don't think he should be prejudiced by the fact that he came down or testified in Court here today.

Mr. Corn: Will the Court Reporter repeat that last to me?

(Whereupon the Reporter reads the last remarks of Mr. Paonessa.)

Mr. Corn: I don't understand that.

Mr. Paonessa: Well, there were some statements made to him in the nature that he would suffer or he [fol. 41] might possibly suffer certain penalties for testifying here in Court today, and I just want to ask him who made these statements to him and what the statements were.

The Court: Ask him. Go ahead.

Direct examination

By Mr. Paonessa:

Q. Mr. Black, did anybody make any statements to you in the nature that you'd suffer any penalty by coming down here and testifying in Court today on behalf of Mr. Ker?

A. As far as what I would say—I mean, I understood them because the officer told me that he had talked to Mr. Berman during the weekend and I says, really, what did he have to—said just that, "You weren't going to make it". Maybe two weeks later the same officer told me, he says, "Well, you realize you are in a cross. If you don't testify for Doug he may shoot you down, and if you don't testify for the State, they are bound to shoot you down". That is as close as I can remember it worded to me.

Q. Did he explain to you what he meant by "the State shooting you down"?

A. Just that I was in a bad position.

Q. And who was this that made these statements?

[fol. 42] A. His name is Magillery.

Q. Are you acquainted with Mr. Doug Ker and the wife, Diane Ker?

A. Yes.

Q. And of your own knowledge, do you know of anything connecting them with the narcotics traffic?

A. No.

Q. Did you ever hear anybody say anything connecting them with the narcotics traffic?

A. Not that I can remember, no.

Q. Did you ever make any statements to Officer Berman or any other police officers or any other persons, for that matter, accusing either Douglas Ker and Diane Ker of being connected with narcotics and the narcotics traffic?

A. No.

Q. Now, Officer Berman just before testified under oath—just before you, and claims that you did make certain statements to him to the effect that Doug Ker was connected with narcotics. Are you prepared to deny that?

Mr. Corn: If the Court please, I don't—I am not going to be technical in any of my objections, let's keep within the bounds of reasonableness, reframe from—too leading a question.

The Court: He may answer the question.

[fol. 43] By Mr. Paonessa:

Q. Are you prepared to deny that, realizing that you are under oath too today?

A. I look at it exactly the way he did under oath, and, no, I did not give him any information.

Q. About how long have you been acquainted with Doug Ker?

A. Maybe four, four and a half years, something like that.

Q. And during this time you knew several of his acquaintances?

A. I know his cousin, and sometimes we used to go to the beach and things like that.

Q. And you never heard any of them say anything about Doug Ker in connection with narcotics?

A. No.

Mr. Paonessa: I have no further questions, your Honor.

The Court: Do you have any questions?

Mr. Corn: Yes, your Honor.

Cross-examination.

By Mr. Corn:

Q. That Magillery, he is a Deputy Sheriff or just a—strike that.

What type of police officer is Magillery?

A. He is an officer at Mira Loma.

[fol. 44] Q. Up at Mira Loma?

And he is attached to the Correctional Facility at Mira Loma?

A. He is a guard, yes.

Q. He is a guard there?

A. I believe so.

Q. Is he your guard, or do you know his first name or his number or anything by which he could be described?

A. I don't have any personal guard but I see him there quite often.

Q. Is he one of the individuals who stay at Mira Loma all of the time?

A. I believe that he lives in one of the apartments that is built there for the officers.

Q. In other words, he has a family up there at Mira Loma?

A. He is single.

Q. And exactly what did he say to you, sir?

A. At which time?

Q. He spoke to you several times?

A. Once every other day.

Q. About this occurrence here?

A. Each time we talked it was involving narcotics.

Q. Forgetting M. Magillery for the moment, sir, you [fol. 45] say you never spoke to Mr. Berman about Mr. Ker?

A. No.

Q. You never mentioned Mr. Ker's name at all?

A. The name was never mentioned.

Q. Do you remember being at the Carolina Pines Bowling Alley when Mr. Berman was there?

A. Carolina Pines?

Q. Yes.

A. If he was there and I was there, I didn't see him.

Q. Did you ever speak to Mr. Berman at the Carolina Pines Bowling Alley?

A. No.

Q. Did you ever see an officer, Deputy Sheriff Lesnick at the Carolina Pines Bowling Alley?

A. Just a minute, the Carolina Pines is the one on Century by the Airport?

Q. Excuse me, your Honor.

Apparently so.

A. Yes, on this particular night I was at my house and the two officers, Mr. Lesnick and Mr. Berman, came over and asked me if I would like to go with them and have a cup of coffee. At this time they bought me a cup of hot chocolate and asked me what I could——

Q. What did you have, hot chocolate?

A. Yes. I didn't remember the name of the——

[fol. 46] Q. At that time, did you not speak to them concerning the Ker's?

A. No.

Q. Did you speak to Joe Berman, the Deputy Sheriff, down at Lennox Station?

A. Joe Berman and I don't talk to each other.

Q. Had you ever spoken to him about anything?

A. He has talked to me.

Q. You are angry at him?

A. I don't care for him.

The Court: That is unimportant, whether he is angry at him or not.

Mr. Corn: I want to ask it for impeachment. With reference to going out to the Carolina Pines, he stated——

The Court: Go ahead.

By Mr. Corn:

Q. You went to the Carolina Pines with Joe Berman, didn't you?

A. With Mr. Berman and Joel Lesnick, yes.

Q. Now, are you presently in jail?

A. Yes.

Q. On a narcotics charge?

A. Yes.

Q. And were you convicted of that narcotics charge?

A. Don't all convicted people go to jail?

The Court: Answer the question, Mr. Black.

[fol. 47] The Witness: Yes, yes.

The Court: You could have plead guilty. There is a difference, you know.

By Mr. Corn:

Q. Was this a felony?

A. Yes.

Q. And was the jail sentence a condition of probation?

A. Three years, yes.

Mr. Corn: No further questions.

One final—are you in fear of your life in jail now if you were known to be an informant?

A. I am not a know snitch, if that is what you mean.

The Court: Know what?

The Witness: Rat informer.

The Court: Well, Mr. Paonessa; what is your theory, why there is no probable cause here?

Mr. Paonessa: Well, separating the two, what I believe is the two legs upon which they stand, one is the fact that they saw—Officer Warthen says he saw Mr. Ker with Mr. Murphy on the evening of July 27th.

The Court: Just a moment, we don't have to inconvenience Mr. Black.

Mr. Paonessa: He may be excused. I have no further questions.

[fol. 48] Just seeing Mr. Ker alone on this occasion, nothing passed between Mr. Ker and Mr. Murphy. The evidence that Officer Warthen actually saw Mr. Ker is not strong. He saw a car which he very conveniently forgot the license number to, and he claims that he recognized Mr. Ker. Well, naturally, he has seen him several times since then. But this, of itself, does not seem to—an officer always takes a license number down when he is pursuing a car and he wants to establish the identity of the owner. Now, he claims that he did this and he wired up to the Department of Motor Vehicles, and that is where he found out who this person was.

Well, I think, that this is weak, and I think that in this case there was certain information given to the Police officers, not the way Officer Warthen testified, but by a person who may have been attempting to release him by providing the officers with some information that he felt the officers were seeking, and I think I should be able to know who this informer is so that I can go into his reliability and try to determine whether or not he was telling the truth. Now, they haven't provided me with the name of this person, whether or not it was actually Roland Murphy or some other person.

The Court: They have informed you that Mr. Black——

Mr. Paonessa: They have informed me——

The Court: The fact Mr. Black denies it does not [fol. 49] mean the Court has to believe him, do I?

Mr. Paonessa: No, your Honor, naturally you are the judge of Mr. Black's credibility, but I was getting to that point. I feel that Mr. Black denies that he ever had any knowledge that either of these defendants were ever connected with narcotics.

The Court: Well, Mr. Paonessa, since when is that testimony and a person is charged with an offense, you can bring in 10,000 people who can say they never heard of him connected with an offense like that. Is that testimony? That is kind of negative. You can ask a person if you ever heard of a person——

Mr. Paonessa: Yes, but I feel in this case the information provided, that Mr. Bernian claims he was provided by Mr. Black, has been challenged. I feel that for the protection of these defendants we should have the name of some of these other informants so that we can find out just who all is involved in this charge against the defendants so that we can properly prepare the defense. They are claiming the defense that they are claiming somebody must have had something against them to try and get them in the trouble that they have gotten them into. I am trying to determine who this person was.

The Court: I don't think it's upon the—incumbent to [fol. 50] furnish the name of the informers, and I don't think it would have any significance as far as their preparing the defense is concerned. Now, I think I have listened very patiently to this testimony and the Court rules that there

is sufficient probable cause to proceed in this action. You are placing the Court in a position of believing Mr. Black instead of the officers which is very awkard for me to do at this time. It may very well be that.

If I feel the State isn't proving their case and they rest, you know I have the authority to dismiss the Information any time I wish, and if I feel there is a great injustice going to be done, I will do it. Therefore, the Court determines it is probable cause, and we will proceed tomorrow morning with this case.

Mr. Paonessa: Thank you.

(Whereupon the Court adjourns at 3:37 p.m.)

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[fol. 51] Santa Monica, California, October 25, 1960, 10:00 A.M.

The Court: Are you ready to proceed with your opening statement?

Mr. Corn: Yes, I will waive opening statement, your Honor.

The Court: All right, do you wish to make an opening statement?

Mr. Paonessa: Not at this time, your Honor.

The Court: Very well, proceed, Mr. Corn.

Mr. Corn: Mr. Weiland.

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Tom Weiland, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name for the record.

The Witness: Tom Weiland.

Direct examination.

By Mr. Corn:

Q. Mr. Weiland; what is your occupation?

A. I am a forensic chemist employed by the Los Angeles County Sheriff's Crime Laboratory.

[fol. 52] Q. As a forensic chemist, what are the functions of your position?

A. The duties of a forensic chemist entail the analysis of various phases of physical evidence that might be involved in crimes. They would include such things as narcotics, blood alcohols, tool marks, hairs, fibers, ballistics, things of that nature.

Q. Counsel, may it be stipulated that this witness is an expert qualified forensic chemist?

Mr. Paonessa: It may be stipulated that he is an expert qualified forensic chemist, but whether he is an expert to identify the substance, I would like to question him on.

Mr. Corn: You may take him on voir dire, if the Court has no objection.

The Court: Yes, if you would like to do that.

Mr. Paonessa: Yes, I would like to do that.

The Court: All right.

Voir dire examination.

By Mr. Paonessa:

Q. Mr. Weiland, the word "forensic" before chemist, just denotes that you are employed by a police agency as a chemist, is that not true?

A. That and also literally a talking chemist, one who describes what he does.

[fol. 53] Q. And in identifying any of the substance here, which lays on the counsel table, did you perform any chemical analysis?

A. In only one of the items present in those packages did I perform any chemical test.

Q. And what was that chemical test?

A. The chemical test was a preliminary test to determine the presence of any possible narcotics. It is called

Mayers reagent, and was added to the solid dose of pills or tablets contained within that evidence.

Q. Did that indicate that there was any——

Mr. Corn: If your Honor please, we are attempting to make a determination of the qualifications of this man, not going into the evidence.

Mr. Paonessa: I withdraw that question.

The Court: Very well.

By Mr. Paonessa:

Q. And the other substances laying on the table, did you perform any chemical analysis of those substances?

A. If I may refer broadly to the leafy substance within those envelopes, I performed no chemical test, no, sir.

Q. No chemical test?

A. That is correct.

Q. By what means did you attempt to identify the substance?

[fol. 54] A. By visual observation under a microscope, using approximately four times magnification.

Q. And this substance—was this substance a plant substance?

A. It was, sir.

Q. Have you had any training as a botanist?

A. I have courses in forestry and similar lines, not per se forestry, no, sir—not per se botany, pardon me, sir.

Q. Have you had any training or have you made any study of the classification of plant life according to the characteristics of its component parts?

A. Somewhat, primarily with reference to those limited plants that become involved in criminal matters.

Q. Have you studied the classification of plants that you say come within criminal matters that you have studied, have you studied other plants in the same family group as the plants that you studied in relation to crimes?

A. With particular reference to one that is in general the Mulberry family, and some in a neighboring family, the Nettle family, I have studied some of these, I have not studied all of them, however.

The Court: Let us proceed, counsel.

Mr. Paonessa: All right.

The Court: Very well, proceed, Mr. Corn.

[fol. 55] Direct examination (Continued)

By Mr. Corn:

Q. Do you have any special degrees?

A. I do, sir.

Q. What are these degrees?

A. I have a Bachelor's Degree in Physiology from the University of California at Berkeley. In addition, I spent three years of graduate work in the field of forensic chemistry, also at the University of California at Berkeley, completing the course work, but not the thesis. I was employed by the University teaching and research in the field of chemistry.

Q. How long have you been a forensic chemist employed as such?

A. Since August of 1956.

Q. And have you seen marijuana before?

A. I have, sir.

Q. And how many times would you say that you have made examinations and tests on marijuana?

A. Any number would be subject to some error. It would number in the thousands.

Q. How many times have you testified in court before as an expert chemist?

A. In——

Q. Both Municipal and Superior.

A. In all types of cases, approximately 1,000 times.

[fol. 56] Q. Your Honor, I offer this witness is qualified.

The Court: Eminently qualified. Let us proceed.

By Mr. Corn:

Q. Now, if the Court please, I have here three packages, one, a small manila envelope which I ask be marked People's—strike that. Withdraw it.

Mark them as they are already marked.

One, a large rectangular manila envelope which I ask be marked People's 1 for identification. One, a bulky lighter color envelope which I ask be marked People's 2

and the other, a small rectangular envelope which I ask be marked People's 3.

The Court: Very well.

By Mr. Corn:

Q. I show you People's 1 and People's 2, sir, and ask you when was the first time you observed these items.

A. I first observed People's 1 and People's 2 for identification on the 2nd day of August, 1960.

Q. Where?

A. At the Sheriff's Crime Laboratory in Los Angeles.

Q. And who gave them to you?

A. The time I first saw them they were in the Narcotics Storage cabinet of the Crime Laboratory.

Q. And in what condition were they?

A. Both envelopes were sealed. I opened them by cutting across one end of the envelope.

[fol. 57] Sealed with a red sealing wax?

A. That is correct, sir.

Q. Now, will you open People's 1? We have a problem here, your Honor, sort of loose—

The Court: Very well.

Mr. Corn: If the Court please, pardon me—

The Court: Maybe we ought to get a newspaper. Get one of the bulletins on the little stand.

(Whereupon the Bailiff supplies a newspaper in front of the witness on the witness stand.)

By Mr. Corn:

Q. People's 1 displays a smaller rectangular package wrapped in brown paper and containing what appears to be a green leafy substance. Was this within People's 1 for identification when you received it?

A. It was.

Q. Did you open it by cutting around the red seal?

A. I opened by cutting the opposite end from the red sealed end.

Q. And would you describe People's 1 for identification?

A. Within the envelope I found this brown wrapped

paper having within it approximately two pounds of a green leafy substance.

Q. Now, did you subject this green leafy substance [fol. 58] to any type of examination?

A. I did, sir.

Q. And what type of examination did you subject it to?

A. A physical examination using magnification of a microscope.

Q. Why did you do that?

A. To determine, if possible, what the substance was by identification of various characteristics on the leaves and seeds of the plant.

Q. And did you form any opinion as a result of that examination?

A. I did, sir.

Q. And what was that opinion?

Mr. Paonessa: Objection, your Honor, I don't believe the proper foundation has been laid to allow this witness to give his expert opinion as to the nature of this substance, and if I—if we may approach the bench, I'd like to discuss that.

The Court: Very well, you may approach the bench.

(Whereupon a discussion was held at the bench between counsel and the Court, outside the hearing of the jury and not reported.)

The Court: You may answer the question.

The Witness: As a result of my analysis I formed the opinion that the leafy substance within People's 1 for [fol. 59] identification consisted of fragments of the plant Cannabis Sativa, known as Marijuana and Indian hemp.

By Mr. Corn:

Q. Incidentally, you have examined substances similar to this before?

A. I have, sir.

Q. And have you had—strike that, I withdraw it.

Do you know how many cigarettes, if any, could be made from this amount of marijuana?

A. I could calculate, I do not know.

Q. Approximately?

Mr. Paonessa: Your Honor, I move that how many cigarettes could be made is immaterial to this case.

The Court: Overruled, he may answer. You can give it approximately.

The Witness: Approximate figure from my experience would be about 800 cigarettes from that quantity. I may be in error—800 to 1600 cigarettes—somewhere within that range.

By Mr. Corn:

Q. I show you People's 2 for identification and ask you to examine the contents thereof and describe them as you do, if you please.

A. Within People's 2 for identification I found a brown paper bag having within it approximately one-half ounce of a leafy material, a box having within it a piece of cardboard and about one-half ounce of a leafy material, a green [fol. 60] plastic vial having within it tablets and also an eye-dropper attached to a white piece of paper.

Q. Did you examine any of these articles to determine whether or not there was anything of a narcotic nature?

A. I did, sir.

Q. Did you find anything of a narcotic nature in any of these articles?

A. I did.

Q. Which article?

A. Within the bag to which I first referred and the box, I found this leafy substance.

Q. Inside this green box—white box—

A. That is correct.

Q. —you found a green leafy substance. And inside the bag you found some additional green leafy substance?

A. I did.

Q. And did you subject this to a microscopic examination?

A. I did, sir.

Q. And what did you determine, if anything?

A. As a result of this examination I formed the opinion that the—

Mr. Paonessa: Same objection, your Honor, if I may renew it. I don't believe the foundation

[fol. 61] The Court: Objection overruled. He may answer.

Mr. Corn: If the Court please——

The Court: I ruled, let us proceed.

The Witness: The leafy substance within the bag and the box consisted of fragments of a plant Cannabis Sativa known as Marijuana or Indian hemp.

By Mr. Corn:

Q. Incidentally, Mr. Weiland, is there any other test that you would use to determine whether or not this was marijuana?

A. There are other tests available. I, myself, wouldn't use them.

Q. Why not, sir?

A. The other test is known primarily as the Duquenois, I believe, Moustapha which is a chemical test. I do not consider it first, specific, second, reliable, and third, in the application of the test I do not believe it reveals the presence of anything which is indicative any more than that which could be observed under a microscope.

Q. Why do you prefer the microscopic test?

A. Basically in my experience with this plant substance I have never found any plant which even closely resembles it in all physical characteristics.

Q. Now, I show you People's 3 for identification and ask you to examine the contents thereof and describe it.

[fol. 62] A. People's 3 for identification within this I found a paper package having within it several seeds and a waxed paper bag having within it a quantity of loose leafy substance. I analyzed first that substance within the paper container, and found therein two seeds which I identified from the plant known as Marijuana and other seeds not Marijuana.

Q. Two seeds of Marijuana in this Scotch tissue towel?

A. That is correct. Within the waxed paper bag I found this quantity of loose leafy material which I found to be Marijuana.

Q. What did you do with these items after you examined them?

A. Upon the completion of the analysis I placed the items back in the envelopes from whence they came, sealed them with cellophane tape and placed them on shelf July in the Sheriff's Narcotic Locker at the Crime Laboratory.

Q. When did you bring them to Court?

A. I did not bring them to Court.

Q. Who brought them to Court, if you know?

A. I would have to speak from laboratory record, I have no independent recollection of that.

Mr. Corn: Cross-examination.

The Court: Proceed.

[fol. 63] Cross-examination

By Mr. Paonessa:

Q. Mr. Weiland, you found some tablets in one of those exhibits. Did you perform a chemical test to determine whether those tablets contained any narcotics?

A. I did, sir.

Q. And what was the result of that test?

A. As a result of that test I determined that the tablets which I tested did not contain any narcotic.

Q. Now, you testified that you didn't perform any chemical test on any of the other substances. You merely observed it under a microscope?

A. That is reference to all of the leafy material, that is correct.

Q. Have you ever made in your career, have you ever made a general survey of the field of plant life to determine the characteristics of all the particular plants and how they were classified?

A. At best it would be called generally brief. I have not specifically studied the field of Botany in detail.

Q. Now, you refer to this substance, you call Marijuana, by its scientific name as Cannabis Sativa.

Now, which of those words denote the genus of this plant?

A. The word "Cannabis" denotes genus, the species, [fol. 64] Sativa.

Q. Do you know how many species there are in the genus "Cannabis"?

A. A total number—I do not know. There is Cannabis

Americus, Cannabis Indicus. There are a couple of others that I cannot recall at this time. They have the same characteristics of Sativa and are generally classified under the term "Sativa," the other term indicating primarily the area—the area of origin or growth.

Q. Have you made a study under the microscope of these other types of Cannabis plants?

A. Referring to Americus and referring to Indicus, I have observed both of those, yes, sir.

Q. And do they have the same characteristics as Cannabis Sativa?

A. Insofar as a leaf structure, physical things present on the leaf and seed structure, they do, yes, sir.

Q. Can you say that the substances you examined in these exhibits were not Cannabis Americus or the other Cannabis which you referred to?

A. I can state that they are Sativa, whether as a subheading here Americus, Indicus, and I believe another one I honestly can't recall the others. I could not state what the origin of these particular plants were, no, sir.

Q. Would Cannabis Americus be a form of Marijuana? [fol. 65] A. It would, sir.

Q. And Cannabis Indicus?

A. It would, sir.

Q. And then is it your testimony that all the Cannabis plants are a form of Marijuana?

A. Those falling under the general and inclusive Cannabis Sativa are the Marijuana group.

Q. Well, then, have you made any study of any of the other plants falling under the heading "Cannabis" aside from Cannabis Americus or Cannabis Indicus and Cannabis Sativa?

A. At this time in all honesty I cannot recall what other plants fall under the generic name "Cannabis", and therefore could not answer whether I have or have not made such a study.

Q. Are all the plants which fall under the heading, "Cannabis", would they all fall under the term "Marijuana"?

A. I believe so, I am not definitely positive on that.

Q. In other words, there may be some other Cannabis plants which have characteristics very similar to what you

found in these exhibits which are not of a narcotic nature, is that not true?

A. This is possible. I honestly do not recall at this time to the best of my recollection all of the Cannabis plants [fol. 66] belonging in the general category Marijuana, but I could not state that definitely.

Q. But, as far as you know, there is a possibility that there are other Cannabis plants which have characteristics very similar to the substances which you examined in these exhibits, is that not correct?

A. As with anything wherein all things have not been tested, this, of course, would be possible, yes, sir.

Q. Now, you say you are familiar with the Nettle family of plants. Is the genus Cannabis a member of that Nettle family of plants?

A. There is conflict even in the field of Botany as to whether this falls in the Nettle family or in the other family which is—I mentioned it before—a Mulberry type.

Q. Mulberry?

A. It is currently believed to the best of my knowledge that this falls within the Mulberry family rather than the Nettle family. This has gone back and forth in the field of Botany over the past year.

Q. Now, it then either belongs to the Nettle family of plants or the Mulberry family of plants, according to your testimony?

A. To the best of my knowledge that is correct, sir.

Q. Now, have you made a close examination of all the [fol. 67] plants, all the other plants within the Mulberry family of plants?

A. As pertaining to the close physical and microscopic examination thereof, I have not.

Q. Then, as far as you know, there may be other plants within the Mulberry family of plants that have characteristics very similar to the characteristics which you observed in these exhibits?

Mr. Corn: Your Honor, that calls for speculation. He has no way of knowing one way or the——

The Court: Can you answer that question?

The Witness: The answer would be similar to one given previously, as with all things that have not completely been

tested this is possible. I have not so encountered such a plant myself.

The Court: Let us proceed.

By Mr. Paonessa:

Q. Now, have you examined all the plants within the Nettle family of plants?

A. The same answer again as applies, I have not.

Q. You have not.

Then, can you say for definite—can you say definitely that the substances which you examined in the exhibits before you were not from another plant within the Mulberry or Nettle family?

A. Again, based on my observations and plants that I have studied, I have found no plants to have exactly the [fol. 68] same characteristics as the plant Cannabis Sativa. Again I have not studied all of them and I could not state definitely that there is not one that could not have characteristics, either partially or in toto that would resemble this plant. I have not so encountered it myself.

Q. And you didn't—you say there are certain chemical tests that could have been used to ascertain whether or not this leafy substance and seeds which you found did—were narcotic in nature, is that not true?

A. That is not true, no, sir. If I may explain.

There are these chemical tests available which test for the higher linear alcohol known as tetrahydro-cannabinol. If this is a narcotic, or assuming that this is the narcotic, then tests are available for this particular higher alcohol. It has never been proven to my satisfaction that this substance or one closely allied to it, the Cannabinol, that either one of these are the narcotic principal, therefore, to test for either one of these and determine their presence would not, in my own mind, indicate the presence of a narcotic.

Mr. Paonessa: Q. In other words, you made no clinical test on this leaf, the plant substances in those exhibits?

Mr. Corn: Asked and answered, your Honor.

The Court: I th[illegible] it has been answered. He can answer it again, if Mr. Pa[illegible]ssa wants it again.

[fol. 69] By Mr. Paonessa:

Q. In fact, you made no chemical test to determine the nature of the plant substances you found, is that not correct?

A. That is correct.

Q. Now, you say there were some seeds found, two of which you identified as probably Cannabis Sativa, as far as you could tell, and too—some other seeds which were of another nature. Do you know what plant those seeds were from?

A. I do not at this time recall even what they look like. I know that at the time I made the analysis they did not—they were not in my opinion Marijuana seeds.

Q. Did they belong to the Mulberry family of plants?

A. Again, I do not even recall their gross characteristics and could not state what family to which they belong.

Mr. Paonessa: I have no further questions.

The Court: Step down, please.

Mr. Corn: Your Honor——

The Court: Excuse me. Go ahead, by all means.

Redirect examination

By Mr. Corn:

Q. You say you examined Marijuana how many times?

[fol. 70] A. I do not know the exact number.

The Court: Great many times, he said. Let us proceed.

By Mr. Corn:

Q. Your Honor, I think this is very material to the case of the People.

The Court: He already said he examined it many, many times.

Mr. Corn: I would like to know how many, approximately, if you can recall.

The Witness: Any number would be subject to error.

By Mr. Corn:

Q. Over how many years, Mr. Weiland?

A. I first looked at Marijuana in 1954 and had much more concentrated experience with it since 1956.

Q. Have you examined it in bulk before?

A. I have, sir.

Q. And when it appears in bulk, does it appear similar to the item People's 1, the bulky leafy green substance?

A. With reference to the brick-like substance wrapped in paper, it frequently appears in that form, yes, sir.

Q. Have you ever seen any by-products of the Mulberry family, nettlebush family, packed in that bulky——

A. In my experience with the Crime Laboratory, I have not.

Mr. Corn: Thank you. No further questions.

[fol. 71] Recross-examination

By Mr. Paonessa:

Q. Just a few more questions:

Mr. Weiland, now, you say the first time you examined substance like Marijuana was in 1954. At that time someone placed that before you and said, "This is Marijuana, this is what it looks like," is that not true?

A. In essence that is true, yes, sir.

Q. And you didn't make an examination of all the plants related to that plant to determine the distinguishing characteristics of the Cannabis Sativa, did you?

A. Of all of the neighboring plants, no, sir. This first exposure to Marijuana I was to pick it out from among 20 allied plants of various natures to include how old the species, and similar such things. This was the preliminary training which I had in Marijuana.

Q. And, based on that first observation, you have been more or less going along saying whatever you saw that looked like it was Cannabis Sativa, is that not true?

A. Based on that, and also the assistance when I joined the Crime Laboratory of persons who have looked at Marijuana over numerous years—well, in excess of 20 years——

Q. Were any of your instructors trained in the field of Botany?

Mr. Corn: Your Honor, we are going——

[fol. 72] The Court: That is too remote, Mr. Paonessa. Let us proceed.

Mr. Paonessa: All right. No further questions.

The Court: Step down. Let us proceed, Mr. Corn, with the next witness.

Mr. Corn: Yes; your Honor.

Mr. Berman.

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Leo Berman, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name for the record.

The Witness: Leo Berman, B-e-r-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Berman, what is your occupation?

A. Deputy Sheriff, Los Angeles County, assigned to the Headquarters Detective Division, Narcotics Detail.

Q. How long have you been on the Narcotics Detail?

A. Approximately three years.

Q. Incidentally, you have a—hair on your chin. Is that a standard uniform for Deputy Sheriffs?

A. This is used in undercover activities, if the people [fol. 73] you are associating with use beards as part

Q. You use that on your job? The Department does not smile on that for the average Deputy Sheriff?

A. That's correct.

Q. Now, sir, are you the arresting officer or one of the arresting officers in this case?

A. I am.

Q. When and where did the arrest occur?

A. It occurred at approximately 9:00 p.m. on July 27, 1960, at 4108 West Shauson Avenue, Apartment 29, Los Angeles.

Q. Pursuant to an investigation, you went to that address?

A. That is correct.

Q. And is that an apartment house?
A. That is correct.
Q. Did you go to an apartment in that house?
A. I did.
Q. What apartment number?
A. 29.
Q. Did you look at the mail box as you entered?
A. I did.
Q. Did you notice the name of the owner of the apartment on that mail box?
A. I did.
Q. What was the name?
[fol. 74] A. George Ker.
Q. Did you gain entry into the apartment?
A. I did.
Q. How did you gain entry?
A. With a key that we was supplied by the apartment house manager.
Q. And you entered the apartment?
A. That is correct.
Q. Who was with you at that time?
A. Sergeant Warthen and Deputy Marvin Love.
Q. Is Sergeant Warthen to my right over here?
A. That is correct.
Q. Now, when you entered the apartment, was there anyone in the room that you entered?
A. That is correct.
Q. There was?
A. There was.
Q. Who was there?
A. The defendant, George Ker.
Q. And where was he?
A. He was seated on the couch in the living room of the apartment.
Q. Do you know how large this apartment is, incidentally, how many rooms?
A. There is a large living room, a kitchen, a bathroom and one bedroom, I believe.
[fol. 75] Q. And the doorway to the kitchen, where does that enter?
A. That enters—there are two doorways, one enters from the living room.

Q. Speak up sir.

A. One enters—one of the doorways enters into the living room leading to the kitchen and the other from a hallway which leads to the bedroom.

Q. Now, could you tell us exactly in sequence and detail what happened when you and Sergeant Warthen entered that apartment?

A. We entered the apartment, I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered he stood up and faced us. I displayed my identification, stated, "We are Sheriff's Narcotics Officers, conducting a narcotics investigation." Simultaneously to that statement the defendant Diane Ker, walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway I observed a small scale on the top of the sink. The top of the scale was the brick-like—brick-shaped package containing the green leafy substance.

Q. This scale was on top of a sink?

A. That is correct.

Q. Were there any pots or pans or anything around [fol. 76] it?

A. I believe there was a knife laying on the sink, other than that I don't recall.

Q. What about the paper on this green leafy substance?

A. It was in the same position it is now with a small rip in the package.

Q. And this scale, where was it with relationship to the sink itself?

A. It was on top of the sink at the—just west of the sink, approximately at a foot it would be in the middle of the sink.

Q. Continue.

A. I then called or beckoned both defendants and Sergeant Warthen into the kitchen. They came over. I pointed to the package, I said, "what is this?" And the defendants answered they did not know. I said, "It appears to be Marijuana to me. Is it yours?" And there were no comments made by the defendants.

Q. What do you mean, "No comments?" Did they say anything at all?

A. There was no answer to my question.
Q. You said, "Is it yours?"
A. That is correct.
Q. And nothing was said at all?
A. No answer came from either defendant.
[fol. 77] Q. Then what happened?
A. I then advised the defendants that they were under arrest for suspicion of violating the State Narcotic Law.
Q. You have been on the Narcotic Detail how long?
A. Approximately three years.
Q. Have you made any narcotics arrests with Marijuana before?
A. I have.
Q. How many, approximately, if you know?
A. In excess of 300.
Q. And you know Marijuana when you see it?
A. I do.
Q. And seeing that Marijuana at that place, People's 1 for identification, did you place them under arrest for the possession of Marijuana?

Mr. Paonessa: Your Honor, I object to this——
Mr. Corn: I am laying a foundation.
Mr. Paonessa:—this officer identifying the substance. He is not qualified. He is just a laymen in the field.
The Court: He can testify he thinks it's Marijuana. It has already been identified to by an expert as to what it is. Let us proceed.

By Mr. Corn:

Q. If the Court please, I do wish the Court to comment with reference to counsel's objection as to this—as to this [fol. 78] officer being an expert. I submit to the Court with the foundation that is laid this officer is an expert as to Marijuana.

The Court: Let us proceed.
Mr. Corn: Would the Court comment?
The Court: Yes, he may answer the question.
Mr. Corn: Thank you.

By Mr. Corn:

Q. You placed the defendant under arrest for possession of Marijuana?

A. That is true.

Q. What happened then?

A. I then asked the defendants if they had any other narcotics or contraband in the apartment. They answered they did not. We then conducted a search in the presence of the defendants throughout the rest of the apartment. We entered the defendants' bedroom. It was a one-bedroom apartment. I asked them if this was their bedroom. They stated it was and during this search of the bedroom I observed this box.

The Court: Identify it. Which is that?

The Witness: This is——

Mr. Corn: People's 2 for identification.

The Court: Very well.

The Witness: And its contents to be, atop a dresser in the bedroom. I asked the defendants if this was theirs and they refused to comment. Once again they refused to [fol. 79] answer the question.

Q. By "Refused to answer" do you mean to say they stated they refuse or didn't say anything?

A. They didn't say anything.

Q. Remained silent?

A. That is correct.

Q. Was this green leafy substance inside that box at the time that you observed it?

A. It was.

Q. And this box was located on top of a dresser?

A. That is correct.

Q. Was there anything else on top of this dresser?

A. I believe there were some papers and possibly jewelry box.

Q. Was anything on top of the box or was it out in the open?

A. The box was out in the open.

Q. Then, what happened?

A. We continued the search, finding the green bottle containing the tablets and the eye-dropper within the chest of drawers.

Q. Then what happened?

A. The defendants along with the evidence, were transported to the Sheriff's Lennox Station and booked on the charge of suspicion of violating the State Narcotic Laws, [fol. 80] the evidence marked for identification, placed and sealed in the envelopes.

Q. These envelopes that you have before you now?

A. That is correct.

Q. Sealed with red sealing wax?

A. That is correct.

Q. Did you transport them down to the Sheriff's Narcotics Laboratory?

A. I believe Deputy Markman and myself did, yes, sir.

Q. Did you pick this up from the Sheriff's Narcotics Laboratory on the date of the preliminary hearing, which was——

Mr. Paonessa: August 3.

Mr. Corn:—August 3, 1960?

The Witness: Deputy Markman and myself picked up the packages.

By Mr. Corn:

Q. And brought it into Court?

A. That is correct.

Q. All of this occurred in Los Angeles County?

A. It did.

Mr. Corn: You may cross examine.

Cross-examination

By Mr. Paonessa:

Q. When you first went into the apartment of Mr. and [fol. 81] Mrs. Ker, how was Mrs. Ker dressed?

A. I believe she had a duster on, dressing gown on.

Q. And isn't it true that when you and the other officers went into the apartment, that Mrs. Ker more or less backed into the kitchen to hide herself from these strangers?

A. That is not true.

Q. You didn't observe that, in other words?

A. I observed her to walk from the kitchen into the living room.

Q. Did she walk directly into the living room or did she remain by the door and sort of trying to hide herself from visibility because of the scanty nature of her dress?

A. She stepped approximately three full steps into the living room, at which time I identified myself.

Mr. Paonessa: I have no further questions.

The Court: Step down please. Proceed, Mr. Corn, with your next witness.

Mr. Corn: Mr. Warthen, please.

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ELVIS A. WARTHEN, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name [fol. 82] for the record.

The Witness: Elvis A. Warthen, W-a-r-t-h-e-n.

Direct examination

By Mr. Corn:

Q. Mr. Warthen, you are a Los Angeles County Deputy Sheriff attached to the Narcotics Detail?

A. Yes, sir.

Q. How long have you been so attached to that Detail?

A. Narcotic Detail, approximately four years.

Q. And you are one of the arresting officers in this case?

A. Yes, sir.

Q. You have made Marijuana arrests before?

A. Yes, sir.

Q. How many times?

A. Quite a few hundred, I don't know the exact number.

Q. How many times have you seen Marijuana before?

A. On several hundred occasions.

Q. You know what Marijuana is when you see it?

A. Yes, sir.

Q. Now, I direct your attention to the contents of People's 2 for identification and ask you, did you observe any of

these articles in the course of your search, other than—[fol. 83] strike that—what has already been testified to?

A. This 2?

Q. Yes, that is part of 2.

A. Yes, sir.

Q. This brown manila bag?

A. Brown manila bag.

Q. Where did you find this?

A. Found that in a cupboard in the kitchen.

Q. Speak into the microphone. In the cupboard in the kitchen?

A. Yes, sir.

Q. Did you speak to the defendants about it?

A. Yes, sir.

Q. What did you say to the defendants about that?

A. When I pulled it out of the cupboard I examined the contents of it, asked them who it belonged to and neither one of them answered my question.

Q. They remained silent?

A. That's correct.

Q. Now, did you have any conversations with the defendants concerning their cars?

A. Yes, sir.

Q. Will you please relate that conversation?

A. I asked both of them together if they had any other [fol. 84] automobile other than the Chrysler product that I had originally observed defendant Ker driving earlier in the day, and they stated that they did not. That was the night of the arrest on the 27th day of July.

Q. Was defendant, Diane Ker, Mrs. Ker, in—present when you asked that question?

A. Yes, sir.

Q. Did you ask that question of her?

A. I asked it of both of them together, as I recall. Douglas Ker answered my question, stating that they did not have any other vehicle.

Q. Did Mrs. Ker indicate her assent or do anything when you said that?

A. I don't believe, as I recall, that she made any answer at all.

Q. She remained silent?

A. Yes, sir.

Q. Did you subsequently make investigation concerning the cars of the defendants?

A. Yes, sir.

Q. Did you have any information concerning a car owned by one Diane Ker?

A. Yes, sir.

Q. Pursuant to that, did you go to a car?

A. Yes, sir.

Q. When?

[fol. 85] A. That was, as I recall, approximately noon, 12:00 noon on the 28th day of July, 1960.

Q. Did you see a registration slip in the car?

A. Yes, sir.

Q. Whose name was the car registered to?

A. Diane Ker.

Q. Did you make a search of that car?

A. Yes, sir.

Q. What did you see in that car, if anything?

A. I found some seeds under the rear seat of the vehicle. I found what appeared to be a lunch bag, sandwich bag, paper bag, which was under the dashboard on the driver's side of the vehicle containing—the bag contained a green leafy substance resembling Marijuana.

Q. This was under the dashboard?

A. That's correct.

Q. And these are the contents of People's 3 for identification?

A. This appears to be the brown—the wax paper sandwich bag that was under the dashboard—the paper towel is one that I placed the seeds in, that I found under the rear seat of the vehicle.

Q. And you placed it in People's 3 for identification, sealed it with red sealing wax?

A. That's correct.

Q. And delivered it to the Sheriff's—strike that—and [fol. 86] gave it to Deputy Sheriff Berman?

A. That's correct.

Mr. Corn: You may cross examine.

Mr. Paonessa: I have no questions of this witness.

The Court: Step down, please.

Proceed, Mr. Corn.

Mr. Corn: Your Honor, I ask that the evidence, People's 1, 2 and 3 for identification and their contents be received into evidence.

The Court: Any objection?

Mr. Paonessa: No objections.

The Court: It may be received.

Mr. Corn: The People rest, your Honor.

The Court: We will take a ten minute recess.

Ladies and gentlemen of the jury, report back in ten minutes. Remember my admonition about discussing this case with anyone.

(Whereupon at 10:55 a.m., the mid-morning recess was taken.)

The Court: Proceed.

DEFENSE

Mr. Paonessa: May I, your Honor, please——

The Court: Do you wish to make an opening statement now?

[fol. 87-96] Mr. Paonessa: Yes, your Honor.

The Court: Very well, by all means.

(Whereupon counsel for defendants makes an opening statement which was reported, but is not transcribed herein.)

Mr. Paonessa: Mr. Kerr, would you take the stand, please?

. . . . . .

[fol. 97-210] GEORGE DOUGLAS KER

Direct examination

By Mr. Paonessa:

. . . . . .

A. Well, I didn't know what was going on and I stood up from my position sitting on the couch, and the officers came in, said, "You are under arrest", and handcuffed me. Two of them handcuffed me. One went into the bedroom, the other officer went into the kitchen, right past my wife

where she was standing right at the doorway there, and then come out and said, "Is this yours? We want you to come in here and see this". So we went in there, well, they took us in there, and said, "Is this yours?" I said, "No." They asked us if we had any knowledge that it was there, if it was ours, and we said, "No", it wasn't ours, and we didn't know how it got there. They had asked us these questions and we had just answered, "No."

. . . . . .

[fol. 211] REBUTTAL

Mr. Corn: Sergeant Keith.

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DON L. KEITH, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.
State your full name, please.
The Witness: Don L. Keith.
The Clerk: Spell your last name, please.
The Witness: K-e-i-t-h.

Direct Examination

By Mr. Corn:

Q. Your occupation, sir?

A. Police Sergeant, City of Glendale.

Q. And how long have you been attached to that Police Department?

A. 14 years, sir.

Q. Are you a detective, sir?

A. No, sir.

Q. Do you have divisions over in the Glendale Police?

A. Yes, sir, we are a little different than some departments.

[fol. 212] Q. What division are you attached to?

A. I am presently attached to Training Division, sir.

Q. And back in 1957, did you have a conversation with one George D. Ker, the defendant in this case?

A. Yes, I did.

Q. And when and where did you have that conversation?

A. This was at approximately 5:00 a.m., I believe, it was the 17th and it was in a small room that we refer to as a Ozalid room machine in the old police building.

Q. Is this pursuant to an investigation concerning narcotics?

A. It was, yes.

Q. Who else besides yourself and the defendant were present?

A. Myself and the defendant only.

Q. Only. Now, did you have any conversation with the defendant about narcotics?

A. Yes, sir, I did.

Q. About Marijuana?

A. Yes, sir.

Q. What did you say to the defendant and what did he say to you?

A. I asked if he had been smoking Marijuana this particu- [fol. 213] lar evening or day and he stated, "No," that he had not. I asked if he had ever smoked Marijuana. He stated that he had but that he got no kick from it. I then indicated that from what I had heard and learned that one trial wasn't a fair trial insofar as Marijuana was concerned due to the fact it has a tendency to make a person sick the first time.

Q. Speak up, sir.

A. Pardon me, he stated that—I stated that it wasn't a fair trial, saying he had smoked it once and it didn't have any effect or kick, my understanding being that the first—first cigarette usually makes a person sick. He indicated that he had smoked it several times and that he got no kick from it.

Q. So he stated he smoked it several times, he got no kick from it?

A. Yes, sir.

Q. At any time did he tell you that the only time that he smoked Marijuana was when he was 10 years old?

A. No, sir, not the age 10 was never mentioned.

Q. He stated he smoked it several times?

A. Yes, sir, he did.

Q. Did you ever show him Marijuana during this period that he was at the police station?

A. During the course of the investigation there was Mari-
[fol. 214] juana out and present in our presence, yes.

Q. Did you show it to him?

A. Yes, he was——

Q. Did you identify it as Marijuana?

A. It was identified as Marijuana.

Q. And he saw it in your presence?

A. Yes, sir.

Mr. Corn: No further questions.

The Court: Do you have any cross examination?

Cross-examination

By Mr. Paonessa:

Q. Sergeant Keith, did you have Mr. Ker at the time sign any written statement to the effect that he had used Marijuana on several occasions?

A. No, sir, I did not.

Q. Is it not true that he told you that the one occasion that he had used Marijuana was when he was around 10 or 10 years old?

A. No, sir, the age 10 was not mentioned.

Q. Was the age 12 mentioned?

A. No it was not.

Q. He told you he used it one occasion, he used Marijuana was at a rather young age then, did he not?

A. He did not state on that one occasion he had used it, no, sir.

[fol. 215] Q. Did he indicate at the time how recently he had last used Marijuana or last smoked Marijuana?

A. No, sir, I don't recall specific time.

Q. And isn't it true, in other words, for a person to get the effect from smoking a Marijuana cigarette they have to be experienced in smoking it and know how to properly inhale and partake of it?

A. This is getting a little out of my field, I couldn't answer, sir. I am not being facetious, I am not trained in it.

The Court: I understand, a very intelligent answer. Let us proceed.

By Mr. Paonessa:

Q. Then, it is true that Mr. Ker never indicated when these occasions were that he used Marijuana?

A. Dates, time nor places was not mentioned, no, sir.

Q. And did you ask him just when he said, "several occasions", did you ask him just how many occasions?

A. No, sir, no, sir.

Q. Did you ever again relate these—this conversation to anyone——

A. The——

Q. —after, did you relate this conversation you had with Mr. Ker at this time back in October, 1957 to anyone else?

[fol. 216] A. Soon after the conversation, when it was made a matter of our departmental record, yes, sir.

Q. And do you have a copy of that record——

A. Yes, sir.

Q. —with you?

A. The Deputy District Attorney, Mr. Corn, has it.

Q. May I see that?

Mr. Corn: Is this the copy I have?

The Witness: This is the copy, yes, sir.

(Whereupon Mr. Corn hands a document to Mr. Paonessa for his perusal.)

Mr. Corn: I have not read that yet myself, so—

The Court: Well, that's all right.

Let us proceed, please.

By Mr. Paonessa:

Q. I draw your attention to——

Mr. Corn: If the Court please, if there is going to be any use of this document in evidence and it is going to be used——

The Court: The document is not going to be used. If it is a document prepared by this police officer and inconsistent with this testimony, he has a right to impeach him. Proceed.

Mr. Corn: That is correct; however, the thing should be before him at the time for the impeachment, it should be before him.

[fol. 217] Mr. Paonessa: I want to give you a chance to look at it first, counsel.

Mr. Corn: As I stated, I have not seen it yet myself.

If there is going to be any attempt to impeach I should have an opportunity to read this document, your Honor.

The Court: May I see those sentences that counsel——

(Whereupon Mr. Corn shows the document to the Court.)

The Court: Which sentence are you referring to?

Mr. Paonessa: The one at the bottom of this paragraph.

(Whereupon an off the record discussion was held between the Court and counsel, outside the hearing of the jury.)

The Court: You may show this to him. You have to read the whole thing later, if you want, on redirect. Show this to him first and then ask him the question.

By Mr. Paonessa:

Q. Now, you stated that in this conversation——

The Court: First, show it to him so he can read it.

Mr. Paonessa: I want to ask him a preliminary question.

[fol. 218] The Court: All right.

By Mr. Paonessa:

Q. You stated in conversation you had with Mr. Ker that he informed you that he had smoked Marijuana on several occasions, is that not true?

A. Yes, sir.

Q. Now, let me show you a sentence from your report which is at the end of this paragraph. Well, if you would read that whole paragraph over.

A. The entire paragraph?

Q. Well it's just the last three lines that I am interested in.

A. I see.

The Court: Read it to yourself.

The Witness: Yes, sir.

The Court: You may ask him the question. Let us proceed.

By Mr. Paonessa:

Q. Now, did you note any place in that paragraph that the word, "Several" was used?

A. No, sir, I did not.

Q. In fact, would you read—not the whole paragraph——

The Court: No, he does not have to read it, you read it.

Mr. Paonessa: Well, I would like to read the last——

[fol. 219] The Court: And the jury will decide what significance they are going to give it as far as any inconsistent statement is concerned.

Mr. Paonessa: I would like to read the last three sentences——

Mr. Corn: If the Court please, I submit this is highly improper. We should read——

Mr. Paonessa:—starting at the word "stated".

The Court: Mr. Corn——

Mr. Corn: Yes!

The Court: Mr. Paonessa may read what he wants to read to the jury, and if you want to read the statement afterward and if the question requires an explanation, let Mr. Keith explain it. The jury will decide what significance they wish to give this so-called impeachment. Now, let us proceed. He may read it. That is my ruling.

Mr. Corn: May I be heard, your Honor?

The Court: Yes.

Mr. Corn: That is correct, your Honor, but I have no idea what is going to be read with reference to what this witness has testified to.

The Court: Well, he told you the last three lines.

Mr. Corn: But this witness has not been asked whether these last three lines are the ones he responded to.

[fol. 220] The Court: What do you mean by "responded to"?

Mr. Corn: In other words, this witness has testified merely to one question, and one question alone with reference to this document, "Does the word several appear". He answered, "No, it does not appear." Now, counsel is going to read three lines from this document. The inquiry that I

posed to the Court is, do these three lines relate to the one question that has been asked of the witness.

The Court: Yes, read the three lines and if you wish, Mr. Keith may offer an explanation. I don't think it has much significance one way or the other. Let the jury attach the significance they wish to it. Proceed.

Mr. Paonessa: I will start about the middle of that paragraph where it says, "Sergeant Keith questioning pertaining to his whereabouts during the evening." That is referring to the defendant, Douglas Ker, "stated he wanted to—and so forth."

Mr. Corn: I beg your pardon, your Honor, "and so forth" is improper.

Mr. Paonessa: He wanted——

The Court: Read it.

Mr. Paonessa: "He wanted to talk to a lawyer first. However, after short questioning he stated to Sergeant Keith that he had used Marijuana before and it did not affect him at all. He got no kick." Now, that is——

[fol. 221] The Court: Is it your contention the word "before" limits it to one instance instead of several?

Mr. Paonessa: Yes, it is—that is my contention.

The Court: Well, I don't know. Let the jury decide what that is. Go ahead. Proceed.

By Mr. Paonessa:

Q. Now, that is your—your notation of the conversation?

The Court: You can explain that, Mr. Keith, if it requires any explanation.

The Witness: The information that you have here in this report was forwarded to the actual investigating officer who made out——

The Court: Did you prepare this report?

The Witness: No, sir, I did not.

The Court: Just a moment, Mr. Paonessa, he didn't even prepare this report.

Mr. Paonessa: What—did you——

The Court: That is sufficient. There is nothing to talk about. All that may be stricken about this report and take the report back.

Mr. Corn: Thank you, your Honor.

The Court: I was under the impression this officer made

that report. He certainly is not responsible for that report if he didn't make it.

By Mr. Paonessa:

Q. Do you have any other notes relating to the conversa-
[fol. 222] tion you had with Mr. Ker about two years ago?

A. No, sir, I do not.

Q. Is this—did you refresh your memory from this report before coming to Court today?

A. Yes, sir, I did.

Q. In other words, you have no independent recollection of the conversation other than refreshing your memory from this report, is that not correct?

A. I did after refreshing my memory, the instance returned.

Q. After refreshing your memory, but first you had to refer to this report, is that not true?

A. Yes, sir, I did.

Q. And you did not prepare this report yourself, someone else prepared it?

A. I did not type the report, no, sir.

Q. Now, in truth and fact, Mr. Ker did state to you upon this occasion that you refer to, that he had smoked Marijuana before but he didn't get much of a kick from it, is that not true?

A. My recollection is that he made the statement that he had smoked Marijuana but that he had got no kick from it.

Q. That is correct.

He had smoked Marijuana but he got no kick from it, and he didn't make any reference to the time when he [fol. 223] smoked Marijuana or how old he was or anything like that?

A. He didn't mention specific times or age.

Mr. Paonessa: No further questions.

Redirect examination

By Mr. Corn:

Q. How many did he mention, how many times though?

A. It was at that time that I indicated to him that from my general knowledge, as I testified to before, that I was

under the impression that one cigarette would probably make a person sick and you wouldn't derive the affects from a cigarette, and if was at that time that he stated he had tried it on several occasions and he did not get a kick from the Marijuana, did nothing for him.

Q. Let me ask you this, sir, you remember the occasion now, do you not, as it occurred then?

A. Yes, sir.

Q. And when was the first time this year that anyone spoke to you about George Douglas Ker? When was the first time I spoke to you about it?

A. Yesterday afternoon about 2:00 o'clock.

Q. When was the first time the Los Angeles County Sheriffs spoke to you about George?

[fol. 224] A. About 3:30 on my arrival here.

Q. And when I spoke to you yesterday afternoon around noon, was it around noon?

A. Shortly after noon, yes, sir.

Q. Did you tell me at that time substantially the same story that you told here on the stand today with reference to the number of times that the defendant had smoked Marijuana?

A. During our discussion it was—it was mentioned, discussed, yes.

Q. Fine.

The Court: Step down.

Mr. Corn: One further question, if I may.

By. Mr. Corn:

Q. How long was the defendant in the station, if you know?

A. Total time I couldn't say, sir. We were together perhaps half an hour, 20 minutes, half an hour.

Q. Do you know of your own knowledge how long he was in the police station?

A. I do not.

Mr. Corn: I see. Fine. Thank you.

No further questions.

The Court: Step down, please. Thank you.

Proceed with your next witness, Mr. Corn.

Mr. Corn: May I ask one or two more questions of this witness from where he is?

[fol. 225] The Court: All right.

By Mr. Corn:

Q. With reference to the preparation of this report. At this time were you a Sergeant?

A. Yes, sir, I was.

Q. And were you the investigating officer in the case in which Mr. Ker was involved, or were you another——

A. A supervising officer.

Q. You did not prepare any reports?

A. I did not.

Q. What is the normal operating procedure of your department with reference to preparation of specific police reports?

A. The field officer assigned to the incidents, or those discovering the incident, make the initial report and it is forwarded to the specific division for follow-up and Court preparation.

Q. When the Court preparation is prepared, it is typed up by someone else other than the individuals who actually observed——

A. Either by the investigating officer or by a stenographer.

Q. —from the various reports and information given?

A. Yes, sir.

Q. And they do copy any specific verbatim, do they?

[fol. 226] A. No, sir.

Mr. Corn: No further questions.

The Court: Proceed with your next witness.

Mr. Corn: Thank you.

Mr. Markman.

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Marvin J. Markman, Called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

Mr. Corn: If the Court please, I was in error. May I have Mr. Warthen before Mr. Markman?

The Court: All right.

Mr. Corn: I am sorry, your Honor.

The Court: He has been sworn. You have been sworn, have you not? You testified before, did you not?

The Witness: I did——

The Court: Oh, this is the first time. Swear him then. I am sorry.

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ELVIS A. WARTHEN, recalled as a witness on behalf of the People, having been previously duly sworn, was examined and testified as follows:

[fol. 227] The Clerk: Be seated, please.

State your full name.

The Witness: Elvis A. Warthen.

The Clerk: Spell your last name, please.

The Witness: W-a-r-t-h-e-n.

Direct examination

By Mr. Corn:

Q. Now, Sergeant Warthen, did you hear the defendant's statement that you advised him—words to the effect, "Go on, try to make a break for it and we will shoot you," or words to that effect?

A. Yes, sir.

Q. Did you ever make such a statement——

A. No, sir, I did not.

Q. —to him or anyone else?

A. No, sir.

Q. How long have you been on the force, Sergeant Warthen?

A. Approximately nine years.

Q. Sorry, will you speak up?

A. Approximately nine years.

Q. How old are you, Sergeant?

A. 38.

Q. You are married and you have a 17 year old son, I understand?

[fol. 228] A. Yes, sir.

Q. You have been on the force nine years?

A. Yes, sir.

Q. How many times did you use your gun in that nine years?

A. Twice.

Mr. Paonessa: Your Honor, this is immaterial, I think.

The Court: Yes. I think as far as using his gun, it is immaterial, suffice to say he denied it. Let us stop there.

Mr. Corn: May I have one other question, your Honor?

The Court: Yes.

By Mr. Corn:

Q. Along this line, with reference to an escape in which the officer was involved in which he behayed with—I think this should be before the bench.

The Court: All right.

(Whereupon a discussion was held at the bench between the Court and counsel, outside the hearing of the jury and not reported.)

By Mr. Corn:

Q. Now, Officer, were you at the—. You were present when the defendant, Diane Ker, was being dressed, were you not?

A. Yes, sir, I was.

[fol. 229] Q. You were in the bedroom with her?

A. Yes, sir.

Q. Tell me, before you went into the bedroom with her, did you speak to her husband?

A. Yes, sir.

Q. What did you tell her husband——

A. I——

Q. —with reference to her dressing?

A. I told her husband to come into the bedroom with her and myself while she dressed.

Q. And did you shut the door when you went in there?

A. I don't recall whether I did or not, I believe I did.

Q. You were the supervising investigating officer in this arrest?

A. That's correct.

Q. You were in charge of the crew?

A. That's correct.

Q. Why did you want the husband in there at that time?

A. From primarily for my own protection.

Q. What do you mean by that?

A. To allay any statements she might make regarding my activity in the bedroom, whether she was dressing.

[fol. 230] Q. Why did you take her into the bedroom to dress? Why did you insist upon going into the bedroom while she was dressing, Officer?

A. For several reasons.

Q. Was she under arrest at this time?

A. She was under arrest —

Q. Fine.

A. —on a charge of a felony and to protect herself from any damage from herself I wanted to be present, also in the event there might possibly be any weapon we overlooked, I didn't want her to be able to obtain them. Also, there were windows in the bedroom, she might also possibly leave through, I didn't want her to leave through windows or any other method.

Q. Were you fearful of the safety of your fellow officers and yourself if the defendant obtained a weapon in the bedroom?

A. That is correct.

Q. Now, what is the normal course of procedure when someone in your department, a narcotics investigating or arresting officer, is searching something in the presence of the defendant, and the defendant is not looking?

A. Well, in all cases where it is possible, we do have we have an arrested person, we have them in the immediate presence where they can observe our activities while we are searching.

[fol. 231] Q. And if they are not looking, do you call it to their attention?

A. Yes, sir, we do.

Q. Why do you do that?

A. Because we want them to be able to observe what we —what we do find, where we find it, we also want them to be able to be sure in their own mind we don't remove things of value that belong to them.

Q. In other words, you are protecting yourself again?

A. That's correct.

Q. And at any time during this procedure did anyone else beside yourself, the defendants, Diane Ker or George Ker, enter that bedroom while Diane was dressing?

A. No, sir, they did not.

Q. You were the only person in there?

A. The two defendants and myself were in the bedroom the entire time. That is the only persons who were in the bedroom.

Q. Where were the other officers?

A. They were, at the time we were in the bedroom, they were, I believe, all in the living room.

Q. Now, sir, did you go into the kitchen?

A. Yes, sir.

Q. Did you, in the kitchen, observe anything on the table [fol. 232] other than the two and a half pounds of Marijuana on the scale?

A. On the table there was a cup containing some coffee, there was a slice of toast and that was partially eaten, and I believe there was some silverware and possibly a butter dish.

Q. Was there a coffee pot any place?

A. Yes, sir.

Q. Where was the coffee pot?

A. There was a coffee pot sitting on the drainboard quite close to where the baby scales containing the Marijuana was.

Q. In other words, the Marijuana and the coffee pot were close by each other?

A. Yes, sir.

Q. Now, did you talk to Diane Ker about her going into the kitchen at any time?

A. I didn't talk to her about going into the kitchen. I talked to her about her being in the kitchen.

Q. Was this at the time of the arrest?

A. Shortly after the arrest, yes, sir.

Q. You talked to her about—let me ask you, what did she say to you about that?

A. First I asked her what was in the package. She [fol. 233] stated that she didn't know, said she had never seen the package and I advised her that being in possession, that it was—it was rather hard to overlook with her being in the kitchen. She stated she was sitting there drinking

coffee and eating toast, and she had not looked in that direction.

Q. She said she was in the kitchen sitting there, drinking coffee and eating toast and had not looked in the direction of the Marijuana?

A. I don't recall if she stated she was in the kitchen, she stated that she was sitting at the table drinking coffee and eating toast.

Q. Sitting at a table drinking coffee. You don't know whether she said, "in the kitchen" or not?

A. I don't recall, I don't believe she did.

Q. Was there any other table in the apartment with coffee and toast on it?

A. No, sir.

Q. Incidentally, did you place the handcuffs on the defendant or did Officer Berman do that?

A. I believe I placed the handcuffs on the defendant, Diane Ker.

Q. Why do you place handcuffs on defendants when you arrest them for felonies?

A. It's primarily because- departmental——

Mr. Paonessa: I think this is immaterial why he goes [fol. 234] through certain procedures.

Mr. Corn: This has been brought up by the defense itself, your Honor.

The Court: It is a little remote. I don't see how this is going to help the case.

Mr. Corn: It was brought up by the defense, obvious statement by the defendant of the time, in the manner, it implied a roughness and some sort of crudeness of the officer.

The Court: It is sufficient that is your normal procedure, to put handcuffs on?

The Witness: That's correct.

The Court: That is sufficient. Leave it there. Let us proceed.

By Mr. Corn:

Q. Now, sir, let me ask you this, let us go back a couple of hours before you made the arrest, before you entered the apartment.

Do you know Ronnie Murphy?

A. Yes, sir.

Q. Were you involved in an investigating one Ronnie Murphy?

A. Yes, sir.

Q. This was a narcotics investigation?

A. Yes, sir.

Q. And in the course of that investigation, did you follow Ronnie Murphy?

[fol. 235] Mr. Paonessa: I object to this line of questioning, your Honor. It does not appear to me that it is proper rebuttal.

Mr. Corn: All right, I will withdraw it and rephrase this one question, your Honor.

The Court: Very well.

By Mr. Corn:

Q. Did you see the defendant, George Ker, any place any time on any street or in any car before you entered that apartment?

A. Yes, sir.

Q. Where and when?

A. I don't recall the exact time. It would be sometime between 8:00 and 9:00 p.m. on the 27th day of—27th day of July, 1960.

Q. Between 8:00 and 9:00 p.m.?

A. Yes, sir.

Q. All right, would you tell us how you observed him?

A. It was at 46——

Q. Strike that. Where were you before you observed him?

A. Before I observed him?

Q. Yes.

A. I was in my own vehicle driving on Fairfax Avenue.

Q. Why did you go to that location?

[fol. 236] A. Because I believed that Ronnie Murphy was coming to that location.

Q. Fine, and so what location is this? What location is this, sir? Is this the Slauson and Fairfax Avenue intersection?

A. That is Fairfax between Slauson and Stocker.

Q. Believing Ronnie Murphy was coming there, you went to that intersection?

A. That's correct.

Q. Approximately what time did you arrive?

A. I would estimate approximately 9:00 o'clock, possibly earlier.

Q. Is this an intersection—are there houses or apartments around this intersection?

A. No, sir.

Q. Describe it.

A. Correction, at the intersection there is. The location I went to there was not.

Q. I see.

At the location you went to, describe this area.

A. Well, Slauson goes up over a knoll there, no buildings on either side of the street; there is an open area, I believe, there is a park back a ways from the street, and one area there.

Q. Did you park on Fairfax?

[fol. 237] A. Yes, sir.

Q. Where did you park on Fairfax?

A. It's about the top of the hill, approximately half-way between Slauson and Stocker.

Q. We have here a blackboard. Would you please draw a diagram of the intersection?

A. How do want it?

Q. Might be better to use paper. We don't intend to offer it, but counsel might. Can your Honor see it?

The Court: Push it over more this way. John, the other way. That is it, a little bit more so that the jury can see it. That is fine.

By Mr. Corn:

Q. Will you draw this intersection, sir?

A. Do you mean the area in there in general? Which intersection do you want?

Q. Fairfax and Slauson, then if you believe it judicious, draw a little more of the area.

Will you do it in a heavier—I think that is not going to come through. Use the crayon, if you will.

Which way is north? Which way is south, Officer? Now,

where were you parked, Officer? Did you park on that—in that area?

A. Yes, sir.

[fol. 238] Q. Was it around 9:00 o'clock?

A. Approximately, yes, sir.

Q. Where did you park? Draw a diagram of your automobile, where you parked. Draw this on there and indicate Stocker up there. Will you do that?

A. My vehicle was parked approximately that position, possibly a little farther back off the street.

Q. Off the street?

A. Yeah.

Q. How many feet is it from this intersection here to this intersection *or* yards or distance?

A. I would say approximately 2,000 feet.

Q. 2,000 feet approximately? Where were you parked, half-way up?

A Approximately half-way, yes, sir.

Q. And how long were you parked there before you saw the defendant?

A. I saw the defendant prior to my parking there.

Q. Will you tell us how you observed him?

A. I was going north on Fairfax and my vehicle—I observed the defendant, that is the defendant, George Ker, seated in an automobile approximately this location (indicating).

Q. Draw a diagram of his automobile, please.

In that location there facing south, right?

A. Facing south, yes, sir.

[fol. 239] Q. How far was he from this intersection?

A. Possibly 500 feet.

Q. 500 feet. Would you put in 500 feet, please?

Are there apartments on this corner, do you know?

A. I believe there is nothing on that corner, as I recall.

Q. What was there opposite this man's car, George Ker?

A. Open field.

Q. Open fields?

A. Yes, sir.

Q. What was there where you were parked?

A. Also open area.

Q. Is this the oil well area?

A. No, sir, I don't believe there is any oil wells in that

area. Our oil wells are north of Stocker, the entire area in there, oil fields.

Q. Are there any apartment houses around here, if you know?

A. Not on Slauson. I don't know.

Q. Let's say around 100 feet south, within 100 feet south of where the defendant's car was parked, were there any apartment houses?

A. No, sir, there were not.

Q. No apartment houses there. Was there 100 feet north [fol. 240] of it, apartments?

A. No, sir.

Q. Were there any cars parked on his side of the street, if you know?

A. There were other cars parked in the area. There was none closer than a hundred feet to his.

Q. None closer than a 100 feet to his?

A. No, sir.

Q. Now, when you passed him, did you see into the car?

A. Yes, sir.

Q. And where was the defendant, George Ker, sitting?

A. He was seated behind the wheel of the automobile.

Q. Was there anybody else in that car?

A. No, sir.

Q. What did you do then?

A. I drove north on Fairfax to the top of the hill to a point where I could observe both down the hill on both sides, and I parked there.

Q. What was your purpose of parking there?

A. Waiting till Ronald Murphy came to that location.

Q. Now, Officer, did you see Ronnie Murphy come to that location?

[fol. 241] The Court: You may resume the stand.

By Mr. Corn:

Q. You may resume the stand. Push that aside so the jurors can see, like a good fellow. Now, you may take the stand.

Did you finally see Ronnie Murphy come there?

A. Yes, sir, I did.

Q. Was he in a car?

A. Yes, sir.

Q. Which way was he driving?

A. He was driving north on Fairfax.

Q. What did you do then?

A. I attempted to follow him.

Q. Your primary concern, sole concern, at that time was Ronnie Murphy?

A. Yes, sir.

Q. Were you interested in George Ker at this time?

A. I had become interested in him in that he was parked there alone in that location.

Q. How long a period elapsed between your first arriving there and seeing Ronnie Murphy?

A. Approximately five minutes.

Q. Five minutes elapsed——

A. Yes, sir.

Q. —between the time you came there and the time that Ronnie Murphy arrived?

[fol. 242] A. Yes, sir.

Q. Now, sir, did you keep your—did you notice Mr. Ker in the car, that he was sitting in it all throughout those five minutes?

A. Yes, sir.

Q. Was he alone all throughout those five minutes?

A. Yes, sir.

Q. This was approximately still before 9:00 or 9:00 o'clock?

A. Yes, sir.

Q. Now, after Ronnie Murphy came, you say you gave pursuit to Ronnie Murphy?

A. I attempted to follow him.

Q. You were not pursuing him?

A. No, sir.

Q. You were tailing him?

A. That's correct.

Q. Did you lose Ronnie Murphy?

A. Yes, sir.

Q. Where did you lose him?

A. I followed him north on Fairfax across Stocker Avenue and into the oil fields and I had his car in sight approximately the equivalent of the city block.

Q. Did you go off in the oil fields on a dirt road or side [fol. 243] road?

A. Took the paved road and turned off his lights soon after he entered the oil fields.

Q. Turned his lights off when he entered the oil fields?

A. Yes, sir.

Q. Was it dark?

A. Yes, sir, it apparently was dark. I——

Q. So what did you do then?

A. After I lost him, I went back to the—approximately the same location I had parked before.

Q. Did you park in the same spot?

A. Approximately, yes, sir.

Q. And how long a period of time had elapsed between the time that you first saw Ronnie Murphy, tailed him, lost him in the oil fields and came back?

A. Possibly two minutes.

Q. Around two minutes?

A. Yes, sir.

Q. So, then, we have a period of seven minutes now between the time you first came there and saw George Ker and the time you are now back there, is that correct?

A. Yes, sir.

Q. Was George Ker still in the car?

A. Yes, sir.

[fol. 244] Q. Was he still alone in the car?

A. Yes, sir.

Q. Sitting behind the driver's wheel?

A. Yes, sir.

Q. Were his lights of his car on or off, by the way?

A. They were off.

Q. Then what happened then?

A. I remained in that—parked in that position until Ronald Murphy came back by heading south on Fairfax.

Q. About how much time elapsed between the time you had returned and you saw Ronald Murphy, the second time?

A. Approximately five minutes.

Q. So, now we have a period of 12 minutes between the time you first arrived, and you now seeing Ronald Murphy, is that correct?

A. Yes, sir.

Q. Was George Ker still in his car at that time?

A. Yes, sir.
Q. Still alone?
A. Yes, sir.
Q. Still seated behind the driver's wheel?
A. Yes, sir.
[fol. 245] Q. Incidentally, did you look inside to see whether or not there was anybody there?
A. Only what I could see by driving by.
Q. Did you see any baby in the car?
A. No, sir.
Q. Now, what did you see Ronnie Murphy do, if anything, and George Ker do, if anything?
A. George Ker remained in the vehicle, seated behind the wheel. Ronnie Murphy got out of his vehicle.
Q. What did he do with his vehicle moving down Fairfax, Officer?
A. Ronnie Murphy parked directly behind Mr. Ker's vehicle.
Q. About how many feet would you say behind? A car length?
A. It would be difficult to say, it wouldn't be more than a car length.
Q. Not more than a car length?
A. That's correct.
Q. Then what did you see happen, if anything?
A. Mr. Murphy got out of his car, walked up to the side of the vehicle Mr. Ker was seated in and remained there for possibly two minutes.
Q. Around two minutes at the side of the vehicle that Ker was in?
A. Yes, sir.
[fol. 246] Q. Could you see anything in Murphy's hands?
A. I didn't see anything in his hands, no, sir.
Q. You couldn't see anything. Was you vantage position so that you could see what was occurring?
A. I could see the persons, I don't—I don't believe I could have seen anything had they had it in their hands.
Q. If they had something in their hands?
A. I don't believe I could have.
Q. Why not?
A. Due to the distance and the fact it wasn't extremely light.

Q. But you did see—you did see Murphy get out of the car and go over to Ker's automobile?

A. I wasn't able to recognize him at that time. I did drive by the car and drove immediately by the two vehicles so that I could view the two persons and get the license number off the vehicle Mr. Ker was seated in.

Q. Now, you took the license number of Mr. Ker's vehicle?

A. Yes, sir, I did.

Q. And communicated that license number to whom?—Strike that.

Did you run a DMV check?

A. Yes, I did.

[fol. 247] Q. That is a Division of Motor Vehicle check——

A. Yes, sir.

Q. —to determine the name—in whose name the car in which he was sitting was registered to?

A. Yes, sir.

Q. Did you communicate that name was Mr. George Ker?

Mr. Paonessa: I object——

Mr. Corn: Strike that. Withdraw the question.

The Court: You may ask him what his investigation disclosed.

By Mr. Corn:

Q. What did your investigation disclose?

The Court: Your check disclose.

Mr. Paonessa: I object to what this investigation disclosed on the grounds it is hearsay.

Mr. Corn: I will withdraw the question, your Honor.

The Court: Very well.

Mr. Corn: I will withdraw the question.

Mr. Paonessa: You withdrew the question but it is still said. I don't think you should have made that statement.

The Court: What statement is that?

Mr. Paonessa: Well, the fact that, insinuating that this car was owned by George Ker.

[fol. 248] Mr. Corn: I ask for a recess at this time.

The Court: The answer will be stricken out.

Mr. Corn: If counsel wishes to oppose this over a recess——

The Court: Let us proceed.

Mr. Corn: I am protecting the recess.

The Court: There will be no recess. After you get through with the direct—or else we will lose our Court Reporter.

Mr. Corn: Thank you.

By Mr. Corn:

Q. Now, Officer, did you give the results of the investigation concerning the license number to any of your other officers?

A. Yes, sir, I did.

Q. Did you give it to Mr. Leo Berman seated to my right?

A. Yes, sir.

Q. Following that, did you have a conversation concerning Mr. George Ker?

A. Yes, sir.

Q. Immediately following that, did you go to Mr. Ker's apartment?

A. We went to the location of his apartment.

Q. Around an hour later, immediately following or—strike that—withdraw the question.

Immediately following your conversation with Mr. Berman, you went to Mr. Ker's apartment, is that correct?

[fol. 249] A. Yes, sir.

Q. Now, when you went to Mr. Ker's apartment, how long—what did you do?

A. First I went to the parking lot behind the apartment to ascertain if the vehicle was there that I had seen Mr. Murphy walk up to. The vehicle was there. I directed one of the officers to ascertain if there was somebody in the apartment. I don't recall which one of them went there. They came back and told me there was someone in the apartment. At that time I went to an office which was marked "Manager". I either knocked on the door bell or rang the door bell and contacted a person there who identified himself as the manager of the apartment. I advised him that I was going to enter the apartment number 29 because I had reason to believe there was a large quantity of Marijuana in the apartment, and asked if I may borrow

a key from him so that we would not have to knock the door down, gaining entrance. He stated that he wanted to call his attorney.

Q. You got a key after this?

A. Yes, sir.

The Court: You got the key, yes, go on, then. You went in the apartment?

Mr. Corn: No, sir, let me—may I ask him one or two other questions?

The Court: All right.

[fol. 250] By Mr. Corn:

Q. How long were you there before you entered the apartment?

A. The entire time would have been 15 to 20 minutes.

Q. Did you hear television going in the apartment?

A. I did not, I didn't go to the apartment.

Q. You went near the apartment—did you enter the apartment?

A. Yes, sir, I did.

Q. Were you the first person in the apartment?

A. Yes, sir.

Q. How did you enter that apartment?

A. I unlocked the door, opened the door and entered.

Q. You used the key?

A. Yes, sir.

Q. Did you make any thunder-like noises?

A. I didn't, I was very careful to be extremely quiet.

Q. Why would you be very careful as a narcotics investigating officer to be extremely quiet when you have a key in your hand entering a house in which you think there is a possibility of narcotics possession being committed?

A. Because on many, many occasions persons have [fol. 251] flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance when I have made noises in the process of entering.

Q. In other words, you had the key in your hand and you wanted to be extremely quiet, in other words, to protect whatever evidence is in the apartment?

A. Yes, sir.

Mr. Corn: You may cross examine.

The Court: Well, we will take a seven minute recess now, and you remember my admonition about discussing this case, members of the jury.

(Whereupon the mid-morning recess was taken.)

Mr. Corn: Your Honor, may I be permitted to take one witness out of order?

The Court: Very well.

Mr. Corn: Mr. Markman.

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MARVIN J. MARKMAN, called as a witness on behalf of the People, having been first duly sworn, resumed the stand and testified as follows:

The Clerk: You have been sworn.

Mr. Corn: Mr. Markman has not been sworn.

The Clerk: He has been.

[fol. 252] The Court: He has been sworn, but he went back. He has been sworn. He has been sworn. Let us go.

The Witness: Marvin——

Mr. Corn: Before I came out——

The Witness: Marvin J. Markman, M-a-r-k-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Markman, you are a Los Angeles County Deputy Sheriff attached to the Narcotics Division?

A. That's correct, sir.

Q. Now, you were present in the—strike that.

You were one of the arresting officers on this case?

A. That's correct, sir.

Q. You were present during the arrest?

A. That's correct.

Q. Were you also with Sergeant Warthen in his automobile during the sequence of events that he has just testified about? At Slauson and Fairfax?

A. That's correct, sir.

Q. Did you see George Ker in his car?

A. That's correct, sir.

Q. Did you see anybody else in his car?

A. No, I did not.

Q. You were seated beside Officer Warthen during this [fol. 253] entire occurrence?

A. That's correct, sir.

Q. And was his testimony the same as your testimony would be?

A. That's correct, sir.

Q. In other words, you would not vary your testimony in any way?

A. No, with the exception of the exact times of arriving at the location and so forth.

Q. What about the amount of time you were there?

A. No, it was the exact amount of time as Sergeant Warthen testified to.

Q. What was the exact amount of time?

A. A. Well, we arrived at the corner, approximately 8:45 p.m. and placed the vehicle at the same area as Sergeant Warthen testified to, and we observed Mr. Murphy's vehicle drive up north on Fairfax and into the oil fields, remain there and then alight from the old fields; approximately 12 minutes elapsed between the time we first observed the defendant, Mr. Ker, in his vehicle and the time that we observed Mr. Murphy pull up behind the defendant's vehicle.

Q. And what time did elapse for this entire sequence in terms of minutes?

A. Approximately 15 minutes.

[fol. 254] Q. About 15 minutes?

A. Yes, sir.

Q. Now, you are sure you arrived there at 8:45 p.m.?

A. That's correct.

Q. Why are you so sure of that?

A. Because at 8:30, exactly 8:30 p.m. of that same evening Sergeant Warthen and myself followed Mr. Murphy's vehicle to 4339 West 102nd Street.

Q. Well, you were involved in a narcotics investigation?

A. That's correct, sir.

Q. As a matter of fact, in that course in investigations of this nature, you note time?

A. That's correct, sir.

Q. Just indicating the time. You take note of time because this is important to you?

A. That's correct, sir.

Q. Why is it important to you?

A. To establish any variance that might arise at a later date as to the time that we observe vehicles and leave vehicles and so forth.

Q. And did you also participate in the arrest?

A. The actual entry in the apartment I was not there, I placed myself in a position in the alley directly beneath the window of the defendants' apartment.

[fol. 255] Q. Why were you placed there?

A. That is a usual procedure in case evidence of any nature would be attempted to be disposed of by throwing it out the window.

Q. You'd be there to catch it?

A. That's correct.

Q. Now, did you hear the defendant—did you hear the officers enter the apartment?

A. No, I did not.

Q. Did you hear any loud thundering noises——

A. No, I did not.

Q. —when you got up there?

The Court: You have asked him if Mr. Warthen's testimony is the same. Let us not go over this same testimony.

Mr. Corn: No, there is one other point that has nothing to do with Mr. Warthen's testimony.

The Court: All right.

By Mr. Corn:

Q. How long was it between the time that they entered the apartment and you entered the apartment, if you know?

A. Approximately a minute, minute and a half, enough time to go upstairs.

Q. Were you called into the apartment?

A. Yes, I was.

Q. Did you see Officer Berman here in the apartment?

[fol. 256] A. As I entered the apartment all the officers and the defendants were in the kitchen.

Q. And did you hear Officer Berman say anything?

A. Yes, I did.

Q. What did you hear him say?

A. Deputy Berman was standing up and his statements were to my nearest recollection, "so that there will be no misunderstanding, we are narcotics officers conducting a narcotic investigation, and you are placed under arrest for violating—suspicion of violating State Narcotic Laws."

Mr. Corn: No further questions.

One final question, do you, of your own knowledge—personal knowledge, know, of the apartment situation in that intersection?

A. Yes, I do.

Q. Will you please describe it for the ladies and gentlemen of the jury?

The Court: Is it the same description as the other officer testified to?

Mr. Corn: If I recall, your Honor, the other officer didn't know the exact nature.

The Court: All right.

The Witness: Shall I leave the stand or——

The Court: Leave the stand, point, yes.

[fol. 257] Mr. Corn: If you want to use—if there are apartments there, would you draw them where they are. You can point it——

A. The corner of Slauson and Fairfax here is a florist shop; directly across the corner is a vacant lot and there are apartment—one string of apartment houses directly north of the parking lot. The defendant's vehicle was parked in a position where there were no apartments. The area was vacant on either side of the street. It was just north of the apartment house that was on Fairfax Avenue. It would be right here (indicating).

Q. Then, immediately across the street from the defendant's car was a vacant lot?

A. That's correct.

Q. Next to the defendant was a vacant lot?

A. That's correct.

Mr. Corn: Thank you, no further questions. You may cross examine.

Cross-examination

By Mr. Paonessa:

Q. Officer Markman, when you first observed the car you claim the defendant was riding in on this evening, how far were you from that car?

A. Where the defendant was sitting in the vehicle, not [fol. 258] riding. I observed him when he was sitting in the vehicle. He was not driving at that time.

Q. And this first occasion when you observed him, how far away were you from the place where you observed the defendant, or the person you claim to be the defendant?

A. When I first observed the defendant, we were driving, turning the corner on Fairfax and were directly across from him, going north on Fairfax Avenue.

Q. Approximately how far away was that in feet?

A. Across the intersection, I imagine it was anywhere between 25 and 30 feet.

Q. And approximately what length of time did you have occasion to observe him at this particular point?

A. At my first observing the defendant, it was approximately 8:45 p.m. that evening when we arrived at the location.

Q. Yes, that isn't what I asked. When you first observed the person you claim to be the defendant, how long did that observation continue?

A. Oh, I see. Approximately 30 seconds, the amount of time it took us to turn the corner and pass the vehicle.

Q. It was just a short glance then, this first observation of the person you claimed to be the defendant?

[fol. 259] A. Approximately 20 seconds.

Q. And when did you next observe the person you claimed to be the defendant?

A. As Sergeant Warthen parked the vehicle at the area which he said he parked the vehicle.

Q. And approximately how far was your vehicle, the vehicle in which you were seated, from the vehicle in which you claim the defendant was seated?

A. Oh, I would imagine—I am not too good at distance, approximately 1500 feet or 2,000 feet or something——

Q. Was the defendant—the car you claim the defendant was seated in in a well-lighted spot?

A. There was no direct lighting at all with the exception of the lights extending from the florist shop.

Q. What time of night did you say this was?

A. Approximately 8:45 when we first arrived there.

Q. And it was already rather dark at that time, was it not?

A. That's correct, sir.

Mr. Paonessa: No further questions.

The Court: Step down.

[fol. 260] Redirect examination

By Mr. Corn:

Q. One question. Did you have the headlights of your car on?

A. As we were turning the corner?

Q. Correct. Yes, did your headlights shine on Mr. Ker's car?

A. That's correct.

Q. Were other cars passing with headlights on in that area? In other words, was there light in that area from which you could see—afforded by headlights of other cars?

A. At one particular time throughout the entire surveillance there was.

Mr. Corn: Yes. Thank you.

The Court: All right, Mr. Markman.

Mr. Corn: May this preceding witness be excused?

The Court: Yes. You are excused, Mr. Markman. You may cross examine.

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Elvis A. Warthen, recalled as a witness on behalf of the People, having been previously sworn, was examined and testified further as follows:

fendant's address was from Deputy Berman, wasn't it?

[fol. 261] The Witness: Elvis A. Warthen.

Cross-examination

By Mr. Paonessa:

Q. Officer Warthen, calling your attention first to the day after the defendants were arrested, and you were standing with the defendant, George Ker, in a hallway at the Lennox Police Station sometime that day, isn't that true?

A. I took him out of his cell back to the apartment for the purpose of searching his automobile. I don't recall standing in the hall with him.

Q. Then, do you recall a conversation with him as you were returning to the Lennox Police Station, do you not?

A. I don't recall any specific conversation with him.

Q. Was there another officer with you when you were escorting Mr. Ker back to the Lennox Station?

A. Yes, sir.

Q. Who was that officer?

A. Deputy Love.

Q. And isn't it true that while entering the Police Station, going through the hallway that one of you made a statement to Mr. Ker to the effect that he could run through that archway if he wanted to, make an attempt to escape?

[fol. 262] A. No, sir.

Q. Isn't it true that when one of you did make that statement that you had your hand—although your guns were in your holsters—that your hands were on the guns?

A. Rather difficult question to answer inasmuch as neither one of us made the statement.

Q. Do you know yourself you didn't make the statement?

A. I was in the immediate presence of the defendant Ker at all times and I didn't make the statement, and I know that Deputy Love did not make the statement because I was in a position that I could have heard him, had he made it.

Q. Now, drawing your attention to the evening of the arrests, when Mrs. Ker was getting dressed, the truth is that during all the time that Mrs. Ker was getting dressed, that Mr. Cook was—I mean Mr. Ker was being held by Deputy Cook out in the living room, isn't that true?

A. That is incorrect. Sergeant Cook was not at that location.

Q. I am sorry, I refer to Deputy Cook. I should have

said Deputy Love. Deputy Love was holding Mr. Ker handcuffed in the living room during the time that Mrs. [fol. 263] Ker was getting dressed, isn't that true?

A. That is not true.

Q. Now, ordinarily, when you arrest the female suspect, is it the proper procedure to call a matron to supervise that arrest?

A. No, sir.

Q. Isn't it proper to call a matron, well—on occasions when you have to search a female suspect?

A. That is correct, a matron was contacted and did make the search of the female.

Q. And isn't it true when a female is required to dress and put on different clothes than she is wearing that, a matron should be called to keep the female suspect in her observation while she is changing her clothes?

A. I can't say whether it's proper or not, counsel. It isn't policy.

Q. Are you not instructed by your superiors to always call a matron whenever there is a female suspect being arrested?

Mr. Corn: This has been asked and answered.

The Court: Yes. Objection sustained. It has been asked and answered.

By Mr. Paonessa:

Q. Well, the truth is that when Mrs. Ker was changing her clothes that you and Sergeant Berman and one of the other officers were present in her bedroom, and the defendant, George Ker, was not present, isn't that true?

[fol. 264] A. That is not true.

Q. The truth is that during all the time Mrs. Ker was changing her clothes, the defendant, George Ker, was handcuffed, isn't that true?

A. That is true.

Mr. Corn: If the Court please, might I interpose not an objection to strike, but the continuous use of the word "truth", as being argumentative. This witness is under oath.

The Court: You can say, "It is a fact". Proceed.

By Mr. Paonessa:

Q. Mr. Ker was handcuffed during the time Mrs. Ker was changing her clothes, wasn't he?

A. That is correct.

Q. And it's true that Deputy Love was questioning Mr. Ker while Mrs. Ker was changing her clothes, isn't that true?

A. That is not true.

Q. Now, directing your attention to the time immediately preceding this address, you claim you saw a vehicle in which it appeared that a person was seated who you believe to be the defendant; when did you first observe that car?

A. I didn't say I saw a vehicle that I believed the defendant was in, I said I saw a vehicle that I saw the defendant [fol. 265] was in. I first observed a car some time between 8:00 and 9:00 o'clock. I am not sure of the exact time.

Q. Where, when? Where was this vehicle when you first observed it?

A. When I first observed it, it was on Fairfax, I would say, estimate approximately 500 feet north of the intersection of Slauson and Fairfax on the west, parked on the west side on the dirt shoulder of Fairfax.

Q. And approximately how far were you from the vehicle when you first observed it?

A. Well, as I recall, a little bit north of the intersection of Fairfax and Slauson is a slight turn in Fairfax, and I believe I first observed him when I came around that turn.

Q. Approximately how far were you from the defendant's vehicle when you first observed it, I believe that was the question? In terms of feet?

A. I don't know, possibly 300 feet, possibly 100.

Q. And did you ever at any time draw closer to this vehicle?

A. Yes, sir.

Q. Approximately how far was the closest you ever came to the vehicle?

A. I passed it later at—I would estimate my car came [fol. 266] within three to four feet of the defendant's vehicle.

Q. Were you going in opposite directions?

A. He was parked, I was traveling.

Q. Was he parked at the left or the right side of the road?

A. He was parked on the right side of the road.

Q. And you were—you were driving a car, were you not?

A. That's correct.

Q. And at this time, along the place where the vehicle you observed was parked, was that a well-lighted place?

A. I don't recall what the lighting conditions were there at all. I do recall looking at the defendant and getting a good view of the defendant.

Q. Did you shine any light on the defendant as you passed by; in other words, to get a good view of him?

A. Not directly, not other than the headlights of our vehicle.

Q. In other words, you were driving your own vehicle, and as you passed the car that you claim the defendant was riding in, you glanced over in his direction?

A. I made it a point to look at him, yes, sir.

[fol. 267] Q. And how long did this observation continue?

A. I would guess it would be a matter of seconds.

Q. Did you look directly into the face of this person?

A. At that particular time, I don't recall just the direction he was looking. He was talking to Ronald Murphy and he was facing either directly toward the street or half-turned that direction, and I did get a fair view of his face at that time.

Q. You had never seen the defendant, George Ker, before that time, had you?

A. No, sir, I hadn't.

Q. You didn't recognize him at that time as a person who you had seen before, did you?

A. No, sir, I did not.

Q. What time of night was it when you passed this car?

A. I believe it was approximately 9:00 pm.

Q. Do you remember testifying in Court last Monday regarding this incident, this observation?

A. Yes, sir.

Q. And do you recall at that time you said that it was approximately 8:00 p.m.?

A. I believe I did, yes, sir.

Q. And, in fact, in response to one of my questions, you said that because it was 8:00 p.m. it was still rather light [fol. 268] with daylight, isn't that true?

A. I believe my reply was at that time I didn't recall whether or not it was light.

Q. Now, what time wa. it when you observed the car in which you claim defendant was? Was it 9:00 p.m. as you now say or 8:00 p.m.?

The Court: Just a moment, counsel. He says, "approximately 8:00 p.m." Approximately 8:00 p.m. may mean 7:00 to 9:00. Certainly, if a man says, "Approximately", he is entitled to an hour each way. His testimony is, "approximately 8:00 p.m.", not 8:00 or 9:00.

By Mr. Paonessa:

Q. All right, then, it was approximately 9:00 p.m. you are now saying you observed the car in which you claim the defendant was driving?

A. Yes, sir, I have since looked at some notes made that night and refreshed my memory. It was closer to 9:00 than it was to 8:00.

Q. And, in fact, it was rather dark at that time, was it not?

A. Yes, sir, it was dark.

Q. And then you proceeded to place, where you indicated on the board—to park your vehicle to keep the car you claim the defendant was in, in your observation, is that not [fol. 269] true? That was your testimony?

A. That was to keep him in my observation; also, to be in a position to observe Ronnie Murphy when he came to that location.

Q. Approximately how far was this point from the car in which you claim defendant was seated?

A. I would estimate 500 feet, possibly as much as a thousand feet.

Q. You just testified on direct examination that it was approximately 2,000 feet?

A. I testified that I would estimate approximately 2,000 feet from the intersection of Fairfax and Slauson to the intersection of Fairfax and Stocker, I believe was my testimony, counsel.

Q. Then, you were parked at the time you were keeping the car in which you claim defendant was seated in your observation, approximately a thousand feet away from it?

A. I said 500 to a thousand.

Q. All right.

And it was rather dark at that time?

A. Yes, sir. I had to utilize a good pair of binoculars, however.

Q. Did these—were these binoculars equipped with any facility for throwing a beam of light?

A. No, sir.

[fol. 270] Q. In fact, isn't it true that the reason you went to the defendant's apartment on that evening was because someone had told you if you went there you'd find a large quantity of marijuana, isn't that true?

A. No, sir, it is not.

Q. Did the name "Dwayne Krug" ring a bell with you?

A. I have heard it here in court today. I have never previously heard it.

Q. Haven't you had occasion to use him as an informer?

A. I never have, no, sir.

Q. To your knowledge, have any of your fellow officers used him as an informer?

A. Not to my knowledge.

Q. Well, in truth and in fact, you received the defendant's address from an anonymous source, did you not?

A. I received the defendant's address from the Department of Motor Vehicles, and also from Deputy Berman, that is, he confirmed the address.

Q. In other words, your first information as to the defendant's address was from Deputy Berman, wasn't it?

A. My first—

Q. That was your first information then after the arrest, [fol. 271] you checked with the Department of Motor Vehicles after the arrest, and after seeing the actual car owned by this defendant; then you checked to see if that car was actually registered to him, isn't that true?

A. I checked the license number on the vehicle the defendant was in with the Department of Motor Vehicles prior to discussing with Deputy Berman. The first time I ever heard the name George Ker was when someone from Motor

Vehicles said that vehicle was registered to George Ker. I believe they said George Douglas Ker, if I recall correct.

Q. I move it be stricken as hearsay, the information he received from the Department of Motor Vehicles. There is no record or certified record that the vehicle that the officer first saw was, in fact, registered through——

The Court: Objection will be overruled. Let us proceed. The answer may stand. It is not hearsay.

Let us proceed.

Mr. Paonessa: Yes, sir, I am trying to.

By Mr. Paonessa:

Q. Officer, now, when you arrived at the house of the defendants, the apartment of the defendants, you arrived there approximately an hour before they returned home, did you not?

A. No, sir, I did not.

[fol. 272] Q. Isn't it true that you went to the landlord and obtained the key and that for approximately an hour, maybe three-quarters of an hour, but for quite a length of time you remained on the front lawn with your fellow officers, is that not true?

A. No, sir, it is not true.

Q. When you first arrived at the defendant's apartment, did you have any knowledge that there was anybody inside that apartment, your own independent knowledge, that there was anybody inside that apartment?

A. When I first arrived, I did not.

Q. In fact, when you first arrived at that apartment, it was empty and there was no one inside of it, is that not true?

A. No, sir, it is not.

The Court: Mr. Paonessa, he answered that question twice and three times.

Mr. Paonessa: On direct examination. I am going over with him on cross examination.

The Court: You are insisting he went to that apartment before the defendants were home and he denied it twice now. Let us proceed.

By Mr. Paonessa:

Q. What was the license number of the vehicle you first observed and claimed Mr. Ker was riding in?

A. I don't recall.

[fol. 273] Q. Now, you claim that you observed the same vehicle at the defendant's apartment. What was the license number on that vehicle?

A. I don't recall.

Q. Now, when you were observing the defendant this evening—the person you claim to be the defendant—at Fairfax and Slauson, did you note what he was wearing?

A. No, sir, I didn't.

Q. Did you, as you passed by in the car, you say you were just relatively a few feet from him, did you note the color of his shirt?

A. No, sir. If I did, I don't recall at this time.

Mr. Paonessa: I have no further questions, your Honor.

The Court: Mr. Corn?

Redirect examination

By Mr. Corn:

Q. You told the defense counsel that you did not go there because someone told you that there was Marijuana in the apartment?

A. That's correct.

Q. Why did you go to the apartment?

A. Because I had seen the defendant with Mr. Ronnie Murphy who I knew to be dealing Marijuana in large [fol. 274] quantities.

The Court: I am not going to repeat his testimony, Mr. Corn.

Mr. Corn: This is not——

The Court: Yes, he went to the apartment.

Mr. Corn: May I approach the bench, your Honor?

The Court: Very well.

(Whereupon the following discussion was held between the Court and counsel, at the bench, outside the hearing of the jury.)

Mr. Corn: Your Honor, counsel has indicated this man went there because someone told him to go there, placed in the jury's mind by that question, your Honor, the indication of a plant. I have to rebut this inference of a plant.

The Court: But he denied it twice, three times.

Mr. Corn: He went there because of that, but should be entitled to explain why he went there.

The Court: He explained why he went to the apartment, because he talked to the fellows together.

Mr. Corn: But it indicates the inference there that Ker— this fellow might have made a plant and the inference logically is drawn from this question.

The Court: The defendant is implying——

Mr. Corn: Ronnie Murphy or the officers——

The Court: That is too far afield. I want to save time [fol. 275] approaching the bench. We are not saving time. You can't go over testimony, you can't go over testimony again.

Mr. Corn: No, he has never testified.

The Court: What are you asking now?

Mr. Corn: I am asking him, your Honor, that the question that he went there because Ronnie Murphy had been to that spot before and involved himself in a sale of narcotics at this spot, and if I'd recall Sergeant Cook and offer his testimony at this time——

The Court: You don't need that testimony. I think it is very clear that why——

Mr. Corn: To you, your Honor.

The Court: And I am not going to let him testify.

(Whereupon the following proceedings were held within the hearing of the jury.)

By Mr. Corn:

Q. When you entered the defendants' apartment, did you have any idea there would be a female inside in a semi-nude condition?

A. No, sir.

Q. And did you ever take a matron along with you on arrests?

A. No, sir.

Q. Now, did you at that time—oh, did you make a notation of the license number of the car that Mr. Ker was in?

[fol. 276] A. Yes, sir.

Q. Did you put that in the report?

A. Yes, sir.

Q. If you saw the report, would that refresh your recollection?

A. Yes, sir.

Q. Is this the report here?

(Whereupon Mr. Corn shows a document to the witness.)

A. Yes, sir.

Q. Is that the car?

A. Yes, sir.

Q. What is the year, model and license number?

Mr. Paonessa: I object to—

Mr. Corn: Strike that, your Honor.

Mr. Paonessa: The officer is using this to refresh his recollection. There is no indication he was the one to prepare it.

The Court: Lay the foundation. Did you prepare this?

By Mr. Corn:

Q. Did you prepare—

A. I assisted in the preparation of it.

The Court: That is sufficient.

By Mr. Corn:

Q. What was the make, model number and license?

[fol. 277] A. Vehicle is a '46 Dodge, two-door coupe, light tan in color, license FVJ-408.

Q. Now, then, you ran a DMV on that car?

A. Yes, sir.

Q. You went to Mr. Ker's apartment?

A. Yes, sir.

Q. When you went to that apartment, did you see this car, this 1946 Dodge there?

A. Yes, sir.

Q. Did you search that car—strike that.

What was the license number of the '46 Dodge at that apartment?

A. FVJ-408.

Q. The same one that you observed at the spot?

A. Yes, sir.

Q. Did you have any conversations with Mr. Ker about the ownership of that Dodge, if you can recall. If you can't——

A. Yes, I did.

Q. And what was that conversation?

A. I asked him if it was his car. He stated that it was.

Q. Oh, you have binoculars in your car at all times?

A. Yes, sir, I do.

Q. And do you use these binoculars in surveillance [fol. 278] investigations?

A. Yes, sir.

Mr. Corn: Thank you. No further questions.

Mr. Paonessa: No further questions.

The Court: You may step down. Do you rest, Mr. Corn?

Mr. Corn: No, your Honor, we have one further rebuttal witness.

The Court: Let us put him on.

Mr. Corn: Mr. Berman.

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Leo Berman, recalled as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: State your name. You have been sworn, Mr. Berman.

The Witness: Leo Berman, B-e-r-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Berman, you were one of the first people to go into the apartment, were you not?

A. That is correct.

Q. Did you use a key in getting into the apartment?

[fol. 279] A. We did.

Q. Did you use—make loud thundering noise?

A. We did not.

Q. You wished to be as quiet in getting into an apartment, do you not, where there is a possibility of narcotics being in the apartment?

A. That is correct.

Q. Now, when you entered the apartment, when did you identify yourself?

A. Immediately upon entering.

Q. And you identified yourself in what words?

The Court: I think he testified to that.

Mr. Corn: That is correct, your Honor. I withdraw the question.

The Court: All right.

By Mr. Corn:

Q. Oh, were you in the bedroom when the defendant was dressing herself?

A. I was not.

Q. Where were you?

A. I was in the kitchen. When they originally went into the bedroom, the defendant, both defendants and Sergeant Warthen, then I proceeded to the living room where I remained until they went to the bedroom.

Q. Were the other Deputy Sheriffs in the living room also with you at that time?

A. They were.

[fol. 280] Q. And the husband of the defendant, Diane, was in the bedroom with her when she was dressing?

A. That's correct.

Q. Did you ever tell Diane Ker, "Now, look at this", while you were uncovering something or, "I want you to watch this"?

A. I made the statements to both defendants throughout the investigation.

Q. What did you tell them?

A. My exact words I do not recall.

Q. Generally, what do you say?

A. "Watch us while we're looking at this particular spot", and so forth. We call their attention to it and if they don't look in our direction when we are checking an article, we reiterate the statement and do not continue the searching until they are watching what we are doing.

Q. You do, though, to protect yourselves and the identity of the thing you are searching, is that correct?
A. That is correct.

Mr. Corn: No further questions.
The Court: Any cross, Mr. Paonessa?

Cross-examination

By Mr. Paonessa:

Q. You were the person who first received information [fol. 281] that the apartment of Douglas Ker contained Marijuana, were you not?
A. Not that information.

The Court: There is no testimony that information was received.

By Mr. Paonessa:

Q. Where did you first receive your information that the apartment of Douglas Ker contained Marijuana?

Mr. Corn: Well, is there testimony when you went in that apartment—well, all right.
The Court: Do you have an objection?
Mr. Corn: I have no objection.
The Court: He may answer the question.
Mr. Corn: I wish to protect the defendant in something, coming out.
The Witness: I at no time received information stating directly that the apartment contained any Marijuana.

By Mr. Paonessa:

Q. Does the name Dwayne Krug mean anything to you?
A. It does.
Q. In fact, you have received information from him on occasions, have you not?
A. I refuse to answer that question.

Mr. Corn: People's privilege 1881.5.
The Court: Do you want the Court's permission so you [fol. 282] should not answer it?
The Witness: Yes.

The Court: You have that permission.

Mr. Paonessa: Then we can infer he has received information then?

Mr. Corn: Oh, your Honor, this is grossly improper.

The Court: Wait just a moment, Mr. Paonessa: Your comment is improper and the jury is instructed to disregard it. Proceed. You have a right to make that inference, if you wish it in your summation. You can make any inferences you wish.

Mr. Paonessa: Yes, in the summation.

The Court: All right.

By Mr. Paonessa:

Q. Wasn't it true that upon the occasion of defendants' arrest that evening, that you received some information from this Dwayne Krug as regarding possession of Marijuana within the apartment of the defendants?

The Court: I have already sustained the objection. He is not permitted to discuss Mr. Krug who may be an informer and he does not have to disclose his source of information.

Mr. Paonessa: Excuse me.

The Court: All right.

Mr. Corn: May I inquire of the Officer as to—may I approach the bench?

[fol. 283] The Court: You will have to have Mr. Paonessa come with you.

Mr. Paonessa?

(Whereupon there was a discussion at the bench between the Court and counsel, outside the hearing of the jury, which was not reported.)

(The following proceedings were held within the hearing of the jury.)

The Court: Let us proceed.

Are you through, Mr. Paonessa?

Mr. Paonessa: Yes.

Mr. Corn: Did you have——

The Court: Is there any question?

Mr. Corn: One question.

The Court: All right.

Redirect examination

By Mr. Corn:

Q. Did you have any information from other individuals concerning the defendant and possible narcotics?

A. I did.

Mr. Paonessa: I object to this, your Honor, on the grounds that it is immaterial to this case. The only—may we approach the bench?

[fol. 284] The Court: No, you have made your objection.

All right, I am going to sustain your objection. The jury are instructed to disregard it. Is there anything else?

Mr. Corn: No further questions.

The Court: What?

Mr. Corn: No further questions.

The Court: Do both of you rest?

Mr. Corn: Yes, we rest.

Mr. Paonessa: We will rest.

The Court: Members of the jury, I wonder if I would impose upon you if I asked you to get back at 20 after 1:00, which gives you an hour and 10 minutes for lunch. Do you think you can handle it without rushing? I will see you at 1:20. Will you gentlemen approach the bench?

(Whereupon there was a discussion between the Court and counsel at the bench, outside the hearing of the jury which was not reported.)

(Whereupon the noon recess was taken.)

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[fol. 285] Santa Monica, California, October 26, 1960, 1:30 P.M.

(Whereupon both counsel made their arguments before the jury.)

(Whereupon the Court reads the instructions to the jury.)

The Court: Ladies and gentlemen, we will take a 10 minute recess. Remember my admonition about not discussing this case with anyone.

(Whereupon at 3:15 P.M. the mid-afternoon recess was taken.)

(Whereupon the Judge continues reading the instructions to the jury.)

The Court: Ladies and gentlemen, I am going to read the instructions to you, but I am not going to complete them so you will be able to go home tonight and then we will instruct you about coming back tomorrow morning.

(Whereupon the Judge continues reading the instructions to the jury.)

The Court: Ladies and gentlemen of the jury, the Court has not completed his instructions to you, therefore, you are not to discuss this case with anyone nor permit anyone to discuss the case with you. You are not to form any conclusions or opinions about this case until you retire to the [fol. 286] jury room tomorrow morning for deliberations. Report here at 9:45 A.M. tomorrow morning for your concluding instruction and you are not to resume deliberations until my instructions are completed which won't be until tomorrow morning. Good night and thank you.

(Whereupon at 3:30 P.M., the proceedings were adjourned for the day.)

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[fol. 287] Santa Monica, California, October 27, 1960, 9:45 A.M.

The Court: Good morning.

(Whereupon the Court reads the last instruction to the jury.)

The Court: Mr. Clerk, swear the Bailiff.

(Whereupon the Clerk swears the Bailiff.)

(Whereupon the jury retires at 9:48 A.M. to deliberate the matter.)

(Whereupon at 11:13 A.M. the jury returns to the jury box.)

The Court: Who is the foreman, please? Mrs. Hendrickson?

Mrs. Hendrickson: Yes.

The Court: Have you arrived at a verdict?

Mrs. Hendrickson: We have, your Honor.

The Court: Hand the verdict to the Bailiff, please.

The Clerk: Title of Court and cause. "We, the jury in the above-entitled action find the defendant Diane K. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information. It is not dated, your Honor.

The Court: We will get the date.

The Clerk: "This blank day of October, 1960, Edith M. Hendrickson."

[fol. 288] The Court: Will you give that to Mrs. Hendrickson, have her date it, please.

The Clerk: Neither one is dated.

The Court: Give it to them and have them date it.

The Clerk: Shall I read it again, your Honor?

The Court: Yes.

VERDICT

The Clerk: Title of Court and cause. "We, the jury in the above entitled action, find the defendant Diane K. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information, this October 27, 1960, Edith M. Hendrickson, Foreman." Ladies and gentlemen of the jury, is this your verdict, so say you once, so say you all?

The Jury: Yes.

VERDICT

The Clerk: Title of Court and cause: "We, the jury in the above entitled action find the defendant George D. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information, this 27th day of October, 1960, Mrs. Edith M. Hendrickson, Foreman." Ladies and gentlemen of the jury, is this your verdict, so say you once, so say you all?

The Jury: Yes.

The Court: Do you wish the jury polled?

Mr. Paonessa: No, your Honor.

[fol. 289] The Court: Very well. Ladies and gentlemen,

the Court wishes to express his personal thanks for your conscientiousness in discharging your obligation to your community.

The Clerk: Will it waive the reading of the verdict, counsel, as recorded?

Mr. Paonessa: Yes, your Honor.

The Court: All right.

Mr. Paonessa: We would like to say at this time we would ask leave to file our written application——

The Court: Yes, you can do it now. Go ahead.

Mr. Paonessa: With the Court's permission, at this time the defendants would like to request—waive time for sentencing and request permission to file a written application for probation.

The Court: Very well. How do you set those? Six weeks?

Mr. Corn: Five weeks, I understand, your Honor, six weeks, whatever the Court desires. I think five weeks would be enough. I am not too familiar with the exact time.

Mr. Paonessa: Well, can we get a date after the first of the year?

The Clerk: December 2nd would be five weeks.

The Court: Do you want it six weeks?

Mr. Paonessa: Six weeks would be more satisfactory.

[fol. 290] The Court: All right, give us the December 9 then.

The Clerk: December the 9th at 9:00 A.M., Department B.

Mr. Corn: Waiver of time?

Mr. Paonessa: Yes.

The Court: Get a personal waiver from the defendants, please.

Mr. Paonessa: Each of you waive your time for sentencing?

Diane Ker: Yes.

George Ker: Yes.

The Court: Audibly, so the Reporter can hear you.

Diane Ker: Yes.

George Ker: Yes.

The Court: Very well, the defendants will be—remain on bail. Any objection to that?

Mr. Corn: I will leave it to the discretion of the Court. I don't have any officers here.

The Court: What was your bail?

The Clerk: $1,000 each.

The Court: Well, in view of the fact ordinarily the bail should be increased, but in view of the fact both their parents are in the community and they are married and have a child, I think the Court will not be unwise permitting the defendants to stay out on the same bail. You are instructed to return here without further notice on De-

[fol. 291] cember 9.

The Clerk: Department D.

The Court: No, in Department A—D right here.

Mr. Paonessa: That is at 9:00 A.M.?

The Court: Is that the time we will hear the case, 9:00?

The Clerk: Yes.

The Court: 9:00 o'clock.

Mr. Corn: Thank you, your Honor.

The Court: All right.

(Whereupon the proceedings in this matter were adjourned.)

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[fol. 292] Los Angeles, California, December 9, 1960, 9:00 A.M.

The Court: Ker.

SUBSTITUTION OF COUNSEL FOR DEFENDANTS

Mr. Stanley: Your Honor, I am Robert Stanley. Defendants, both of them, move at this time to substitute Al Matthews and Robert Stanley in this case, in the place and stead of Anthony Paonessa.

Mr. Paonessa: It is agreeable, your Honor.

The Court: Very well, substitution may be granted. These folks are up here for sentence.

Mr. Stanley: That is correct, your Honor.

I wish to state for the record, there is legal cause why they should not be sentenced at this time. Each defendant moves for a new trial in the case and we would request a week from today, your Honor, for the hearing on that. Actually, any day would otherwise be satisfactory, except Mr. Matthews and I are engaged in a murder trial in De-

partment 102 and Friday is the only day the Court over there is not in session.

The Court: Well, you have a situation here where these people were represented by counsel and the Court was ready to hear a motion for a new trial by Mr. Paonessa and I do not think this is grounds for continuance at this time. It is awfully late in the proceedings. The people are ready to be sentenced.

[fol. 293] Mr. Stanley: All right, the Defendants move for a new trial on all statutory grounds, your Honor.

The Court: Very well, your motion will be denied.

I am ready to sentence these people now and if there is no legal cause why judgment should not be pronounced and you won't waive arraignment, I will arraign them.

Mr. Stanley: We waive arraignment for judgment and sentence and there is no further legal cause why judgment should not be pronounced.

SENTENCE.

The Court: Very well.

Mr. Ker, the Court has given this matter a vast amount of thought. While I do not believe when one is sentenced he should be lectured to—and I am not going to engage in that—but as you know the crime of which you were convicted is a very pernicious one and in the Court's opinion it is people like you that are vastly responsible for the horrible practice that we have among younger children. I am thinking of your two year old daughter, and the Court is going to do everything in its power to see that this practice is minimized. You were represented by very able counsel but your defense was frivolous and in the Court's opinion, absurd. The Court has read and considered the Probation Report, and the Court will deny probation and sentence you to State Prison: and, Mrs. Ker, in your case I [fol. 294] have spent many sleepless hours about what to do with you. Both of you come from very fine families, both have fine parents, and considering the fact that you have a two year old child has given me a vast amount of uneasy hours: but I think your crime is so vicious and unforgivable and must be punished. The Court has read and con-

sidered the Probation Report and will give the following sentence:

I am only giving you this consideration—you may not think it's consideration but the Court does—because you are the mother of a two year old child. I am sending you to State Prison if you ever get in another difficulty, is that clear?

Mrs. Ker: (Nods head affirmatively.)

The Court: You are going to County Jail and the terms of five year probation are as follows:

Defendant will spend six (6) months in the County Jail. 1, 6, 7, 13, 14, 16, 18. The Defendant will not use or possess any narcotics, narcotic paraphernalia and stay away from places where addicts congregate. Defendant shall not associate with known narcotics users or sellers. Defendant will cooperate with the Probation Officer in a plan for psychiatric, psychological or other treatment. Defendant will seek and maintain employment as approved by the Probation Officer. Defendant will maintain residence as approved by the Probation Officer. Defendant will obey all [fol. 295] laws, orders, rules and regulations of the Probation Department.

Mrs. Ker, I have considered the fact that it means that you will be separated from your child during the Christmas holidays, but I say that in all earnestness and great humility, I don't think you deserve any consideration.

That will be all. Defendants will be remanded into the custody of the Marshal.

[fol. 296] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Santa Monica "D" Hon. Benjamin Landis, Judge.

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, and DIANE K. KER, *Defendants.*

STATE OF CALIFORNIA,
County of Los Angeles, ss.

JUDGE'S CERTIFICATE

I, Benjamin Landis, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the Judge who presided at the trial in the above entitled criminal cause, do hereby certify that no objection has been made to the within transcript by either the defendant or his attorney, or the District Attorney within the time allowed by law; and the same is now, therefore, approved by me on this — day of ——, 1961.

——, Judge.

[fol. 297] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Santa Monica "D" Hon. Benjamin Landis, Judge.

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, and DIANE K. KER, *Defendants.*

STATE OF CALIFORNIA,
County of Los Angeles.

JUDGE'S CERTIFICATE

I, Benjamin Landi Judge of the Superior Court of the State of California, in and for the County of Los Angeles, being the Judge who presided at the trial in the above entitled criminal cause, do hereby certify that the objections made to the transcript herein have been heard and determined, and the same is now corrected in accordance with such determination, within the time allowed by law; and the same is now, therefore, approved by me this — day of ——, 1961.

——, Judge.

[fols. 298-300] Clerk's and reporter's certificates to foregoing transcript omitted in printing.

[fols. 301-302] [File endorsement omitted.]

[fol. 303] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

No. 2nd CR 7541

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Defendants and Appellants.

**Closing Brief of Appellants**—Filed July 19, 1961

Before discussing the points which have been raised in the Reply Brief of the Respondents, we wish to bring to the attention of this Honorable Court certain decisions which have been handed down since the filing of the Opening Brief herein.

I

A MAN'S HOME IS HIS CASTLE AND THE INVASION THEREOF IS PROTECTED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

When the decision in *People v. Cahan* (1955) 44 Cal. 2d 434 was handed down, it reversed the previous rule in California which held that evidence could be admitted regardless of how it was obtained and installed the Federal rule which held that evidence illegally obtained, or obtained in violation of the Constitutional rights of the defendant, was inadmissible. However, in rendering that decision, The [fol. 304] Supreme Court of the State of California stated: "... In developing a rule of evidence applicable to the state Court, this Court is not bound by the decisions that have applied the Federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this Court need not follow them."

The quoted portion of the Cahan decision has now been overruled by the decision of *Mapp v. Ohio*, rendered by the United States Supreme Court on June 19, 1961, Case No. 236 in the October Term 1960, and reported in United

States Supreme Court Bulletin at page 2781. In a decision written by Justice Clark, it was held:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

At page 2793 it is said:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, this is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Thus, under the Mapp decision, we may test the facts in a State case by decisions of the Federal Courts against the agents of the Federal Government. If the evidence would not be admissible in Federal Courts, it may not be admitted [fol. 305] in State Courts.

In examining certain of the Federal decisions involving facts similar to those presented in the case at bar, it should be noted that:

(1). The officers broke into Appellants' home, at night, without warning, using a key secured from the landlord;

(2). The officers first searched and found marijuana and then arrested the Appellants;

(3). Previously that evening, the officers had observed a meeting between Appellant George Ker and Murphy (a known narcotic source), but had seen nothing pass between them;

(4). The officers had heard of Ker from various sources over a period of six months as selling marijuana from his home.

In *Johnson v. United States* (1947), 333 U. S. 10, 68 S. Ct. 367, officers smelled opium smoke emanating from a hotel room, knocked on the door, identified themselves to the defendant, entered and arrested the defendant. A subsequent search revealed opium. In holding that there was no reason why a search warrant could not have been first secured, the Court held: "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the

search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office [fol. 306] and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the fundamental distinctions between our form of government, where officers are under the law, and the police-states where they are the law."

In *Agnello* v. *United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145, it was decided:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

*Chapman v. United States* (1961) 81 S. Ct. 776, decided in April of this year, involved a landlord smelling the "odor of mash" coming from rented premises. He called state officers who entered through an unlocked window, found a still, called Federal officers, and arrested the defendant when he returned home. The Federal officers took him into custody, took evidence of the operation, and destroyed the still. In reversing the conviction the court said that "in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

In *Taylor v. United States*, 286 U. S. 1, 52 S. Ct. 466, [fol. 307] 76 L. Ed. 951, the facts were similar to the case at bar. Federal agents had received information of activities at a garage. They smelled the odor of alcohol or whiskey coming from the garage. They looked through a small opening and saw a number of packing cases. Without warrant they broke in and found whiskey. While there the defendant came from his house to see what was going on and was placed under arrest. In reversing the conviction the Court held that there was no reason for failing to secure a search warrant and that surveillance would have prevented the removal of the evidence. "Prohibition officers may rely on a distinctive odor as a physical fact indicative

of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees . . . against unreasonable search."

The decision in *Silverman v. United States*, 81 S. Ct. 679, decided in March of 1961, Involved the use of a "spike mike" which penetrated a party wall and came in contact with the heating ducts of a house and enabled officers to listen in on all conversations in the house. The Court held:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

There have been many decisions of the United States Court of Appeals which have held that an invasion of a man's home is a violation of the Fourth Amendment. In [fol. 308] the case of *Hobson v. United States* (1955) 8th Cir, 226 Fed. 2d 890, surveillance had been maintained on a woman for several years. With knowledge that she had been engaged in an illegal sale of narcotics, a month later officers went to her residence to arrest her. After knocking and identifying themselves at the door, her husband threw a package out the back window and an agent stationed there shouted the fact to the officer at the front, who in turn broke in and arrested the husband. At the time the intruding officers did not know the contents of the package, although later it proved to contain narcotics. In reversing the conviction of the husband, the Court held that a search warrant should have been procured.

In *Morrison v. United States*, 262 Fed. 2d 449, 104 U. S. App. D. C. 352, the Court held that an entry is lawful or unlawful at the time it is made, and a subsequent seizure has the same legal character as the entry which made the seizure possible.

The United States Courts are fairly unanimous in requiring that a search warrant be secured before searching a man's house, except where it is incident to an arrest, (*Agnello v. United States*, supra page 4,) and the rule and rationale of the Federal decisions are now applicable to searches made by state officers in state prosecutions under the authority of *Mapp v. Ohio*, supra page 2.

The California Supreme Court rendered a decision on [fol. 309] May 1, 1961, in *People v. Privett*, 55 A. C. 703, in which the Court reversed a conviction and held:

> "The sanctity of a private home is not only guaranteed by the Constitution of the United States and of our own state, but it is traditional in our Anglo-Saxon heritage. 'A man's home is his castle' is and should be more than an empty phrase . . . There was no emergency in this case which would have prevented the officers from seeking a warrant from a magistrate to enter this home."

In *People v. Keener*, 55 A. C. 719, also decided on May 1, 1961, held that "under the Fourth Amendment, even where there is probable cause, officers may not search a house without first obtaining a warrant, unless there are exceptional circumstances, such as danger that evidence will be removed or destroyed." (*Chapman v. United States*, 81 S. Ct. 776, supra, p. 4; *Johnson v. United States*, 333 U. S. 10, supra p. 3).

## II

### There Was No Probable Cause to Arrest Before Search, and No Reasonable Cause to Search Without Warrant

When the officers entered the apartment of Appellants' they first went to the kitchen and found the marijuana and then placed the defendants under arrest. This is the testimony of the officers. (Rep. Tr. p. 30). In other words they conducted a search before making an arrest. Let us see if [fol. 310] there were any facts which would make this justifiable under the cases.

Contrary to the testimony of one officer and the contention of the Respondent (Resp. Br. p. 17) apparently Ker did not drive North on La Brea, make a "U" turn and head South. Sgt. Warthern testified (Rp. Tr. p. 238) that Ker was parked on La Brea headed South and that Murphy caine by headed South and parked his car behind Ker's (Rp. Tr. p. 245). Therefore, it was not with knowledge that he was being followed that prompted Ker's driving away. If we were to assume that Respondent's contention was based on correct facts and that Ker headed North on La Brea, anyone familiar with the area would know that it is a consider-

able distance to the next intersection from Saluson and La Brea, when heading North on La Brea, and that to make a "U" turn would be the natural inclination if a person wanted to go back to Slauson. There is nothing in the facts to show that Ker had any knowledge that he was being followed, other than he made a "U" turn. Whichever officer is believed, there is nothing to indicate that Ker had any knowledge that he was being followed. Nor is there anything to show why the officer, if he were following Ker, did not also make a "U" turn and follow him.

Now, the transaction in which Ker is supposed to have had a part, differs materially from the transaction which took place the night before. In the first transaction, Murphy came to Terrhagen's car, took Terrhagen away, brought him back, Terrhagen got into his car and had a kilo of Marijuana—also Terrhagen was parked headed North, [fol. 311] whereas Ker was alleged to have been parked headed South.

The officers saw nothing in Murphy's hands when he went up to Ker's car (Rp. Tr. p. 246) and they saw nothing pass between them (Rp. Tr. p. 23, lines 4-6). As to lighting, the officer testified, p. 23, lines 24-26:

> "A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall."

Therefore, at the time they went to Appellants' house, they had no knowledge that a crime had been committed in their presence and no knowledge that Appellants, or either of them, were committing a crime. All the officers had was a suspicion gained from informants. That this suspicion was confirmed by the search was fortunate for the officers, but at the time the officers broke into the apartment, they had nothing but a suspicion and they did not have enough to justify an arrest until they had made a search.

As said in *People* v. *Privett*, 55 A.C. 703 (supra p. 7):

> "This court has held that an arrest without warrant can only be made if the facts known to the officers *before* making the arrest would justify the officers in making the arrest and that such an arrest cannot be

justified by what a search following the arrest turns up."

(*People v. Brown*, 45 Cal. 2d 640.)

[fol. 312] CONCLUSION

We sincerely believe that the judgment of conviction should be reversed and dismissal of the action directed.

Respectfully submitted, Matthews and Stanley, by Al Matthews, Attorneys for Appellants.

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[fol. 313] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Petitioners.

## Petition for Hearing

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Your Petitioners, George D. Ker and Diane K. Ker, respectfully petition for a hearing in this Honorable Court after a decision in the District Court of Appeal for the Second Appellate District affirming a judgment of conviction in the Superior Court of the County of Los Angeles, and denial of a petition for rehearing.

STATEMENT OF FACTS

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. Your Petitioners entered their pleas of not guilty and a trial before a jury was had, resulting in verdicts of guilty. [fol. 314] Thereafter the Petitioners were sentenced by the Honorable Benjamin Landis as follows: as to George D.

Ker, probation was denied and he was sentenced to the State Prison for the term prescribed by law; as to Diane K. Ker, she was sentenced to the California Institution for women, but sentence was suspended and she was placed on probation for the period of five years upon the usual conditions, one of which being that she spend the first six months in the County Jail. Thereafter, a timely notice of appeal was filed, execution of the sentences was stayed, and the Petitioners were released upon bail pending the determination of their appeals. Upon August 29, 1961, the District Court of Appeal, Second Appellate District, Division One, affirmed the convictions in an opinion written by the Honorable Justice Lillie. A petition for rehearing was filed and denied on September 20, 1961.

At the trial and out of the presence of the jury the Petitioners moved for a dismissal of the information under Section 995 of the Penal Code. After taking evidence on the issue of probable cause, and allied subjects, the court denied the motion and the trial was held.

Attached hereto as an appendix is the decision of the District Court of Appeal in this matter, to which reference will be made for the facts. However, certain facts which are believed to be vital to this proceeding will be emphasized.

Briefly an undercover officer of the Sheriff's Office made a purchase of marijuana which was taken from a kilo of [fol. 315] marijuana which was purchased near the intersection of Slauson and Fairfax Avenues in Los Angeles. The next night undercover officers, engaged in surveillance of the principal supplier of the marijuana, parked about a thousand feet from the same intersection. At that time he observed a car parked near where the officer had been parked the night before when the kilo of marijuana was delivered. He observed the supplier park behind the parked car, get out of his car, talk to the occupant of the parked car for two minutes, and then observed both cars leave. The officer followed the parked car until it made a U-turn and he lost it, but he secured the license number and a check revealed that the car was registered to the defendant George Ker. The officer testified that he was observing the meeting between Ker and the supplier through glasses. He testified as follows:

"Q. And what time of night was it that this took place when you observed Mr. Ker, Mr. Murphy approach this car you claimed Mr. Ker was in?

A. As I recall, it was about 8:00 o'clock.

Q. Was the place well-lighted, or was it pretty dark?

A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall. [fol. 316] Q. And did you actually see—I mean, I withdraw that, excuse me.

Did you actually recognize the person who was in the car that Mr. Murphy approached as the defendant sitting with me at the counsel table, Mr. Douglas Ker? Did you actually recognize that person at that time?

A. I didn't know Mr. Ker at that time. I observed him well enough to where I could identify him as the person seated next to you now."

(Rep. Tr. p. 23, line 18 to p. 24, line 9)

Just prior to this testimony, Sergeant Warthen had testified as follows:

"Q. Did you see anything pass between Mr. Murphy and Mr. Ker at that time?

A. No, sir.

Q. Did you hear any of the conversation between the two?

A. No, sir."

(Rep. Tr. p. 23, lines 4 to 9)

Another officer, Deputy Berman, that he had received information from various sources, commencing in November, 1959, and running to May of 1960, that Ker was dealing in narcotics from his home; that from May of 1960 to the arrest in July of 1960 he had received information on three or four occasions from one Black regarding Ker's activities [fol. 317] in marijuana. This Black took the stand for the defendants and testified that he was then serving time in the Sheriff's Honor Farm and that he had never told Berman of any narcotic activity by Ker, that he had known Ker for four or four and a half years and did not have any knowledge that Ker was engaged in the narcotic business.

The defendants sought to secure the names of the other informants from whom Officer Berman testified he had received information. The officer claimed the privilege of Section 1881.5 of the Code of Civil Procedure. The Court sustained objections as to any further questions regarding these informants and stated at p. 49, line 25 of the Reporter's Transcript:

> "The Court: I don't think its upon the—incumbent to furnish the name of the informers, and I don't think it would have any significance as far as their preparing the defense is concerned."

Officer Berman testified that he had no reliance or feeling about the reliability of Black but he did believe that his information was reliable because on three other occasions he made arrests based upon information from Black. However he does not state whether these arrests resulted in convictions. Officer Berman then testified:

> "Q. Now, pursuant to this information, did you then [fol. 318] go to Mr. Ker's apartment?
>
> A. That is correct.
>
> Q. Where was that located?
>
> A. At 41 or—correction—4801 West Slauson Avenue, Apartment 29, Los Angeles.
>
> Q. Tell us the circumstances of the arrest.
>
> A. We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received a key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthen and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriff's Narcotics Officers and advised George Ker that we were *conducting a narcotics investigation*, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were *conducting a narcotics investigation*.
>
> I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed

[fol. 319] a brown package that had a small tear in it, a square package, upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds.

. . . . . .

A. I then advised them that—the defendants that they were under arrest . . ." (Emphasis added)

(Rep. Tr. p. 28, line 19 to p. 30, line 9).

Later on, during the trial proper, Sergeant Warthen testified: (Rep. Tr. p. 270):

"Q. In fact, isn't it true that the reason you went to the defendants' apartment on that evening was because someone had told you if you went there you'd find a large quantity of marijuana, isn't that true?

A. No, sir, it is not."

And Deputy testified during the trial (Rep. Tr. p. 280, lines 26 to p. 281, line 18):

"Q. You were the person who first received information that the apartment of Douglas Ker contained marijuana, were you not?

A. Not that information.

The Court: There is no testimony that that informa-[fol. 320] tion was received.

Q. By Mr. Paonessa: Where did you first receive your information that the apartment of Douglas Ker contained marijuana?

The Witness: I at no time received information stating directly that the apartment contained any marijuana."

In addition to this kilo of marijuana, the officers found two other items of marijuana in the apartment. The next day the officers searched a car belonging to Diane Ker and found some more marijuana.

No admissions or confessions of the defendants were in-

troduced other than evidence of their silence when accused of the commission of crimes.

After the denial of the motion to dismiss under section 995 of the Penal Code, the trial proceeded. There was no evidence introduced by either the people or the defendants that they knew the marijuana was present in the apartment or car, or that either of the defendants had management and control over the marijuana, or that they knew that it was marijuana or had narcotic properties.

[fol. 321] GROUNDS FOR HEARING IN SUPREME COURT

This Petition for Hearing by the Supreme Court is based upon the ground that the hearing is necessary:

(1). To secure uniformity of decision; and
(2). To settle important questions of law.

CONTENTIONS OF PETITIONERS

Your Petitioners contend:

(1). That the motion under section 995 of the Penal Code should have been granted because:

(a). The evidence introduced by the People failed to show that the officers had reasonable cause to enter Petitioners' apartment and conduct a search;

(b). The evidence introduced by the People failed to show that the officers had probable cause to make the arrest;

(c). The evidence introduced by the People was secured by an illegal search and seizure in violation of Petitioners' Constitutional Rights under the California and United States Constitutions;

(d). The identity of informers was kept secret and unavailable to Petitioners by the witnesses for the People.

(2). The People failed to prove that the Petitioners had [fol. 322] dominion and control over the evidence seized, had knowledge of its presence, and had knowledge of its narcotic character.

(3). That the Petitioners were denied a fair trial and their conviction was a miscarriage of justice under Art. VI, section 4½ of the California Constitution.

(4). That Petitioners' conviction was a denial of due

process of law under the XIV Amendment of the United States Constitution.

## Argument

After the filing of Petitioners' opening brief before the District Court of Appeal the decisions by this Honorable Court in *People v. Privett* (May 1, 1961) 55 A. C. 703 and *People v. Keener* (May 1, 1961) 55 A. C. 719 and the decision by the United States Supreme Court in *Mapp v. Ohio* (June 19, 1961) — U. S. 111, 6 L. Ed. 2d 1081, were handed down. It is Petitioners' belief and contention that these cases are controlling in this matter and require a reversal of the judgment of conviction and the mandate of this Honorable Court to dismiss the information.

### I

### The Constitutional Rights of the Petitioners Were Violated

In considering this point the following facts should be noted:

(1). The officers had neither a warrant to arrest the Petitioners or a warrant to search their apartment;
[fol. 323] (2). The officers ascertained that Petitioners were home and in the apartment;
(3). The officers secured a key to the apartment from the landlord and entered the apartment of the Petitioners without warning or advising Petitioners of their presence or without the consent of Petitioners;
(4). The officers identified themselves and stated that they were conducting a narcotics investigation;
(5). The officers then went into the kitchen, saw the marijuana, which could not be seen from the living room which they had first entered;
(6). The officers then placed Petitioners under arrest.

In *People v. Privett*, 55 A. C. 703, this Honorable Court reversed the conviction and stated:

> "The sanctity of a private home is not only guaranteed by the Constitution of the United States and of our own state, but it is traditional in our anglo-Saxon heritage. 'A man's home is his castle' is and should be more than an empty phrase."

In that decision this Court set up a parallel with the facts existing in *People v. Saunders*, 46 Cal. 2d 247 and your Petitioners submit that a similar parallel can be set up in this case to the same effect. In so doing we shall set up the [fol. 324] facts in this case first, those of *Privett* second, and those of *Saunders* third and shall paraphrase the words of this Court in *Privett*. Substitute information that Ker had been dealing in narcotics for record of burglary for record of bookmaking: substitute a meeting and conversation between Ker and a known narcotics supplier for conversation on the street with another man who also had a burglary record for the fact that another bookmaker had been on the premises the day before and "the parallel could hardly be closer."

In *People v. Keener*, 55 A. C. 719, this Court pointed out that "That the United States Supreme Court requires that 'under the Fourth Amendment, *even where there is probable cause*, officers may not search a house without first obtaining a warrant, unless there are exceptional circumstances, such as danger that evidence will be removed or destroyed'. (*Chapman v. United States*, 81 S. Ct. 776; *Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367)." (Emphasis added).

Then in the decision in *Mapp v. Ohio*, 81 S. Ct. 1684, it was held at p. 1691, by the United States Supreme Court that:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."
>
> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is en- [fol. 325] forceable against them by the same sanction of exclusion as is used against the Federal Government."

Before the District Court of Appeal these decisions were presented in your Petitioners' Closing Brief. Leave of Court was secured to filing a supplemental brief by the Respondent and an additional reply brief by the Petitioners. Without any recognition being given to the decisions of this Court in *People v. Privett* (supra) or *People v. Keener*

(supra) the District Court of Appeal disposed of the decision in *Mapp v. Ohio* in the following words:

> "In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendant's apartment, the recent reference to *Mapp v. Ohio*, —— U.S. ——; 81 S. Ct. 111; 6 L. Ed. 2d 1081, does not justify a change in our original conclusion."

This statement would seem to indicate that the District Court of Appeal failed to grasp the significance of the facts of the case or of the decision in *Mapp v. Ohio*. The controlling point here is the entry into the apartment, what happened after that is immaterial. The officers' purpose in making that entry is clear from their own testimony—they entered, not to make an arrest, but to conduct a narcotics [fol. 326] investigation (supra p. 6). They did not place either defendant under arrest at that time. The officers first searched for the marijuana, albeit the first search involved merely going into the kitchen, yet to the officers in the living room there was nothing open to see, they had to go to the kitchen. This constituted a search and it was only after this search which revealed the marijuana that the officers placed the defendants under arrest. However, this search was after the entry and the question still remains whether the officers had the right to make the entry—in other words, were the constitutional rights of the petitioners violated by the entry of the officers. Not only will it be demonstrated hereinafter that the officers had no reasonable or probable cause to either search or arrest, but the rationale of the authorities is that the officers had no right to enter even though they had reasonable or probable cause.

In *Morrison v. United States*, 262 Fed. 2d 449, 104 U.S. App. D. C. 352 the Court held that an entry is lawful or unlawful at the time it is made, and a subsequent seizure has the same legal character as the entry which made the seizure possible. This is precisely the point involved here.

The principal contention of Petitioners finds strong back-

ing in the decision in *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 where the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And [fol. 327] such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

The case of *Johnson v. United States* (1947) 333 U.S. 10, 68 S. Ct. 367, presented the situation where officers smelled opium smoke emanating from a hotel room, they knocked and identified themselves, entered and arrested the defendant and a subsequent search revealed opium. In holding that a search warrant should have first been secured the court said:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right to the people to be secure in their persons, houses, papers and effects' and would obliterate one of the fundamental distinctions between our form of government, where officers are under the law, and the police-states where they are the law."

*Chapman v. United States* (1961) 81 S. Ct. 776, presented somewhat similar facts, where the odor of mash was smelled, officers entered through an unlocked window and found a still. In reversing the conviction the Court said:

> [fol. 328] ". . . in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

In *Taylor v. United States*, 286 U.S. 1, 52 S. Ct. 466, 76 L. Ed. 951, where Federal officers had received information regarding activities at a garage and had smelled whiskey at the garage and observed packing cases, they broke in with-

out a warrant and found whiskey. In reversing the conviction the Court said:

> "Prohibition officers may rely on a distinct odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees . . . against unreasonable search."

The recent decision in *Silverman v. United States*, (1961) 81 S. Ct. 679, involving a "spike mike" which was inserted through a party wall, contacting a heating ducts and thus permitting officers to listen to conversations, produced this language by the Court:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

The Petitioners submit that the entry of the officers to [fol. 329] Petitioners' apartment was illegal and improper and that the Constitutional rights of the Petitioners were violated.

## II

### The Officers had no Probable Cause

Even though Petitioners contend that the entry was illegal regardless of the existence of probable, they announced hereinbefore that they would demonstrate the lack of probable cause.

As said in *People v. Privett*, 55 A. C. 703:

> "This court has held that an arrest without warrant can only be made if the facts known to the officers *before* making the arrest would justify the officers in making the arrest and that such an arrest cannot be justified by what a search following the arrest turns up."

Citing: *People* v. *Brown*, 45 Cal. 2d 640.

In speaking of the search that was made in *Johnson v. United States*, (1947) 333 U. S. 10, 68 S. Ct. 367 (supra. p. 15), the Court said:

> "Since it was without warrant, it could be justified only if for a crime committed in the presence of the officers of which he has reasonable cause to believe defendant was guilty."

At the time of entry the facts which were available to the officers were:

[fol. 330] (1). Deputy Berman had received information over a period of six months, ending two months prior to the entry, that Ker was dealing in marijuana from his home;

(2). Deputy Berman had received information from Black on three or four occasions during the two months preceding the entry, of Ker's activities;

(3). Sergeant Warthen observed a meeting between Ker and a supplier on the night of the entry, but *observed nothing pass between them;*

(4). These various items of information were passed to the various officers including information that Berman had received a "mug shot" from the Inglewood Police Department several months before, but there is nothing in the record of any information of a crime committed by Ker and in fact no prior conviction was charged or proved.

(5). The night before the entry Sergeant Warthen had observed a meeting in which one Terrhagen had secured a kilo of marijuana and in turn sold a portion of it to an officer, this meeting being at the approximate location of the meeting with Ker.

This was what was known by the officers at the time of the entry. There is nothing to lead a reasonable person to believe that a crime had been committed in his presence or [fol. 331] that contraband was in Ker's possession or apartment. The District Court of Appeal deals with this situation as follows in its decision:

> "While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable inference from what had occurred just prior thereto, the past repute, furtive conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery

> of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial circumstantial evidence destroys any merit to appellant's position that because the officers, by reason of distance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession."

This quoted statement entirely disregards the actual facts—the officer did not say that because of distance and the time of night he did not see anything pass—what he did say was that he was observing through glasses, that it was quite light and he could see very well (supra p. 3). If he could see well enough to be able to identify the Petitioner, [fol. 332] Ker, he should have been able to see an object at least as big as half of a human's head. A kilo of marijuana, in brick form, is eight to ten inches in length; it is larger than an ordinary building brick. It was testified that one ounce of marijuana would yield from 40 to 60 cigarettes from which testify we can conclude that from 2.2 10 pounds, some 40,000 cigarettes can be secured.

Now, as defined by the Code of Civil Procedure, section 1958, an inference is a deduction which may be drawn from a fact proved. The District Court of Appeal would have us believe that it would be a reasonable inference that this kilo of marijuana had been delivered by Murphy to Ker. There is no fact from which such inference may be drawn. The true facts are to the contrary. The officer testified that he saw nothing pass—no ifs or ands or buts—no qualification of that statement in any wise—he did not see any marijuana pass between Murphy and Ker.

Therefore, there was no probable cause to believe that Ker was committing a felony at the time the entry was made by the officers. It was a fishing expedition, no more, no less, to see what they could find. The People now seek to justify that entry, the search and the arrest, as they must do when it is apparent that there was no warrant, and this they cannot do in this shoddy a manner. There is no legal reason giving the officers the right to enter the Petitioners' apartment without first securing a warrant.

[fol. 333]

III

THE IDENTITIES OF THE INFORMERS SHOULD HAVE BEEN REVEALED

If the officers relied on information from reformers over the six month period prior to the arrest, then the identity of these informers should have been revealed upon request by the petitioners. Particularly is this true when we consider that the one informer who was identified, Black, testified exactly contrary to the officer. That they did rely upon these informers is self-evident from the fact that this testimony was given on the issue of probable cause. Let us pose a supposition: suppose that there had been five other informants, in addition to Black; suppose that their identities had been revealed and the Petitioners had subpoenaed them into court; and suppose they had all testified in the same way as Black did; how much credence would a Court or jury give to the officers testimony?

Under the doctrine of *Priestly v. Superior Court*, 50 Cal. 2d 812, the names of these informants should have been revealed, rather than concealed behind the shield of section 1881.5 of the Code of Civil Procedure. That there was no motion to strike is clearly accounted for by the Court's attitude (supra p. 5). (*People v. Chatman*, 166 Cal. App. 2d 627).

IV

THE EVIDENCE WAS INSUFFICIENT TO PROVE KNOWLEDGE ON THE PART OF PETITIONERS

[fol. 334] It is well settled that in a prosecution for possession of narcotics, the prosecution must prove that;

(1). The forbidden substance was under the dominion and control of the accused;

(2). That the accused was aware of its presence;

(3). That the accused knew of the narcotic nature and character of the substance.

*People v. Tabison*, 166 Cal. App. 2d 271;
*People v. Gory*, 28 Cal. 2d 450;
*People v. Bledsoe*, 75 Cal. App. 2d 862;
*People v. Cgndiotto*, 128 Cal. App. 2d 347.

The burden is on the people to establish knowledge of the presence and narcotic nature of this substance:

*People v. Winston*, 46 Cal. 2d 151;

*People v. Hernandez*, 172 Cal. App. 3d 754.

The record is replete with testimony by the officers that the marijuana was in the apartment of Petitioners but this is not enough.

In the recent case of *People v. Born*, 187 A. C. A. 105, it was stated:

> "Knowledge of the narcotic nature of the object possessed constitutes an essential element of the crime of possession of narcotics, and the prosecution must establish that a defendant entertained such knowledge. (citing cases) Even if a defendant has not denied his knowledge of the narcotic nature of the substance in [fol. 335] his possession, the prosecution must still carry the burden on this issue."

The language in *People v. Bledsoe*, 75 Cal. App. 2d 862 is certainly persuasive here:

> "This is not, however, a case where the finding of the trial court is conclusive because of conflicting evidence, but it is one of a failure of the State to prove the essential elements of the crime . . . the evidence wholly fails to show appellant's knowledge 'of the presence' of the drug to justify a finding of 'knowledge' to satisfy the terms of the statute."

Particularly as to the Petitioner Diane Ker, there is no evidence whatsoever that she had ever had anything to do with marijuana or knew what it was. The only evidence against her is that the contraband was found in the house where she lived with her husband and baby and in her car which was parked in back, but had been unused. Aside from what has been previously discussed hereinbefore, the only other evidence against the Petitioner Douglas Ker is that several years before he admitted that he had smoked a marijuana cigarette partially. There is a lot of difference between marijuana in the bulk and that revealed in smoking a cigarette and knowledge of the one would not necessarily be knowledge of the other.

[fol. 336] So far as Mrs. Ker is concerned, she is no more than a bystander. In *People v. Antista*, 129 Cal. App. 2d 47, the Court said:

> "In all the cases we have examined in which conviction was upheld there was some incriminating circumstances in addition to the presence of marijuana or narcotic which indicated knowledge of the defendant of its presence and his control of it."

Under circumstances similar to those involved here, the convictions were reversed in *People v. Bledsoe*, supra p. 23, and *People v. Antista*, supra. In *People v. Gory*, 28 Cal. 2d 450, where marijuana was found in the defendant's foot locker at the Sheriff's Honor Rancho, it was held that the rejection of an instruction that the jury must find that defendant "knowingly had such objects in his possession" was reversible error.

There is no evidence whatsoever that the Petitioners had any knowledge of the presence of the marijuana or the character of the substance. In this regard the People failed to prove their case.

## Conclusion

Petitioners submit that the matters shown herein are of sufficient importance to require consideration by this Honorable Court and that there should be a reversal of their conviction with a mandate to dismiss the information.

Respectfully submitted, Matthews and Stanley,
By Robert W. Stanley.

[fol. 337] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Criminal No. 7541

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Defendants and Appellants.

Appeal from judgment of the Superior Court of Los Angeles County, and order denying motion for new trial. Benjamin Landis, Judge.

Matthews and Stanley for Appellants.

Stanley Mosk, Attorney General, and George W. Kell, Depaty Attorney General, for Respondent.

OPINION—FILED AUGUST 29, 1961

Defendants were charged with possession of marijuana in violation of Section 11530, Health & Safety Code. A motion for dismissal under Section 995, Penal Code, was denied; the following was offered on the issue of probable cause. Sergeant Cook, negotiating for the purchase of marijuana arranged to meet one Terrhagen around 7 P. M. on July 26, 1960. Terrhagen picked up Cook in his car and drove to a bowling alley which he entered; he returned in a few minutes and told Cook they were to meet the "con-[fol. 338] nection" by the oil fields near Slauson and Fairfax Avenues; Terrhagen then pointed out a parked 1946 DeSoto as the "connection's" car. They drove to Slauson and Fairfax where Cook again saw the 1946 DeSoto; Terrhagen told Cook the "connection" had his supply of narcotics somewhere in the hills. They parked in the vicinity near some vacant fields; the DeSoto proceeding ahead of them made a U-turn and pulled alongside. Cook identified the driver as Roland Murphy, whom he knew from "mug" photographs and police information to be a large-scale seller of marijuana then out on bail on two narcotic offenses. Terrhagen entered the DeSoto leaving Cook in the car;

they proceeded north on Fairfax over the hill and into the oil fields out of Cook's sight and returned fifteen minutes later. Murphy pulled up alongside the car in which Cook was waiting; Terrhagen entered carrying a kilo brick of marijuana. Murphy drove off northbound on Fairfax; Terrhagen drove home where he carved off of the kilo of marijuana a pound which Cook bought. Cook then relayed the foregoing information to Sergeant Warthen and Deputy Berman.

During all this time, Sergeant Warthen had Murphy under surveillance and observed the transaction with Cook; he also thereafter received from Cook direct information concerning it. The next day, July 27, 1960, Sergeant and Deputy Markman again took up surveillance of Murphy, starting at Murphy's home following him in his 1946 DeSoto to the same bowling alley. He remained there ten minutes, returned to the DeSoto and drove off; Sergeant Warthen [fol. 339] tried to follow but lost him; Warthen then drove to the Slauson-Fairfax location where he had staked out the evening before and observed Cook, Murphy and Terrhagen. Seated in his car with the lights off, parked near some vacant fields a short distance away, they saw defendant Ker, whom they did not then know. They were not then interested in Ker; their prime interest was Murphy whom they suspected to be a large-scale marijuana dealer and of whom they were conducting a narcotics investigation. Soon Murphy drove past in his DeSoto north on Fairfax; they tried to follow but lost him when he turned off his lights upon entering the oil fields. Shortly thereafter, Murphy returned, stopped behind Ker's automobile, got out, walked over to his car and appeared to talk to Ker. It was then between 8 and 9 P. M. Sergeant Warthen was about 1000 feet away and observed them through glasses; soon Ker drove away. Sergeant Warthen followed but lost him when he made a U-turn in the middle of the block; however he obtained the license number of the car and a check disclosed it was registered to Douglas Ker at 4801 Slauson. Fifteen minutes later, Sergeant Warthen communicated the foregoing to Deputy Berman.

Since November, 1959, Deputy Berman knew Ker as a narcotic suspect; he had received bits of information regarding him from "various persons"; he had been told Ker

was selling marijuana from his home and he was possibly securing it from Ronald Murphy, alias "Ronnie" Murphy; in early 1960, he received a "mug" picture of Ker from the Inglewood Police Department and until May, 1960, con- [fol. 340] tinued to receive various bits of information about him. Between May and July, 1960, Berman received information concerning Ker from one Black, a previous informant whose information Berman had used in other cases on at least three occasions resulting in arrests of two on forgery and one on narcotics and whose information Berman believed to be reliable; Black also supplied information to Berman relative to Murphy which had aided officers in their investigation of Murphy resulting in a complaint in the Federal Court which was then pending. Black had told Berman that Ker and others had bought quantities of marijuana from Murphy.

Acting upon the foregoing information and that relayed to him by Sergeants Cook and Warthen as hereinabove described, on July 27 between 9 and 10 P. M., shortly after Warthen had observed Murphy and Ker; Berman, Warthen and Deputy Love went to an apartment house at 4801 West Slauson Avenue; they first determined that Ker's car was parked behind the apartment house, ascertained that defendants lived in apartment 29 and were home, obtained a key from the manager so they would not have to break the door down, unlocked the door quietly so defendants would not hear their approach and attempt to destroy the evidence, and entered. The apartment had a kitchen, living room, bedroom and bath room. Ker was seated in the living room; they identified themselves and told him they were conducting a narcotics investigation; simultaneous therewith, Ker's wife, Diane, walked from the kitchen into the living room; Berman identified himself to her and immediately walked to the kitchen door without entering; standing in the door- [fol. 341] way Berman observed a small scale on top of the sink—on the scale was a brown paper package containing a 2-2 10ths pound brick of marijuana (Exhibit 1); near it was a knife.

Defendants called Robert J. Black, presently serving time in Mira Loma, as their witness. He testified he had known them 4½ years but denied knowing anything connecting them with the narcotic traffic, and denied he ever

made statements to that effect to Berman or any other police officer; he admitted having met Deputy Berman at the bowling alley.

The motion denied, the matter was tried before a jury. Evidence of Sergeant Warthen's surveillance of Murphy and Ker, and Berman's entry on the premises was presented to the jury. Continuing with his testimony, Deputy Berman, after walking to the kitchen door and seeing the marijuana on the scales said to defendants: "What is this," defendants answered they did not know; Berman said, "It appears to be marijuana to me. Is it yours?", defendants did not answer. Deputy Berman then arrested defendants and asked them "if they had any other narcotics or contraband in the apartment. They answered they did not. The officers then took defendants into the bedroom; there they saw a box containing ½ ounce of marijuana (Exhibit 2) atop a dresser; asked if it was theirs, defendants remained silent. Sergeant Warthen searched the kitchen and found in the cupboard a brown manila bag containing ½ ounce of marijuana (Exhibit 2); asked to whom it belonged, defendants remained silent. Warthen also saw in the kitchen [fol. 342] a cup containing coffee, a partially eaten slice of toast and some silverware on the table, and a coffee pot on the drainboard close to the marijuana on the scales. Mrs. Ker told Warthen that she had been sitting at the table in the kitchen drinking coffee and eating toast, but had not looked in the direction of the marijuana. Sergeant Warthen then asked the defendants if they owned any other auto than the one parked in the back and which they had seen Ker driving; Ker said they did not; Mrs. Ker remained silent. Berman had information Mrs. Ker owned a car; around noon the next day he went to the car which was registered in the name of Diane Ker, searched it and found marijuana seed under the rear seat and a bag containing marijuana (Exhibit 3) in the dashboard compartment.

In his defense, Ker testified that he and his wife left the apartment at 7:30 p. m. to look for a new apartment, and returned at 10:00 p. m.; that before leaving he received a call from an unknown person and that a kitchen window had been tampered with in their absence. He denied prior knowledge or possession of the 2-pound brick of marijuana (Exhibit 1); admitted ownership of the box (Exhibit 2) but

denied the marijuana in it was his; denied having met anyone during the period between 7:30 and 10:00 p.m., except Beswick whom they had visited; and admitted he knew Murphy but denied any rendezvous with him. Mrs. Ker corroborated her husband and denied prior knowledge of the marijuana (Exhibit 3) found in her automobile. Mr. Ker's [fol. 343] father and mother and Mrs. Ker's mother corroborated defendants' testimony relative to the "suspicious circumstances" of the telephone call and the tampering kitchen window. Beswick testified defendants visited him that night in his apartment. The theory of the defense was that while defendants were absent between 7:30 and 10:30 P. M. someone planted the marijuana in their apartment.

On rebuttal Sergeant Keith of the Glendale Police Department testified to a conversation with Ker in 1957, wherein the latter told him he had smoked marijuana several times but got "no kick out of it"; that Ker saw marijuana, which was identified as such, at that time.

In as much as the officers had no warrant, for the arrest or defendants to be valid the former must then have had reasonable cause to believe they had committed a felony. (Sec. 836(3), Penal Code; *People v. Bracamonte*, 194 A.C.A. 168). There being no formula for its determination, what constitutes "reasonable cause" depends upon the facts and circumstances of each case (*People v. Ingle*, 53 Cal. 2d 407; *People v. Wickliff*, 144 Cal. App. 2d 207; *People v. Hollins*, 173 Cal. App. 2d 88)—the situation presented or apparent to the officers at the time they were required to act. (*People v. Evans*, 175 Cal. App. 2d 274; *People v. Hollins*, 173 Cal. App. 2d 88; *People v. Silvestro*, 150 Cal. App. 2d 114; *People v. Carella*, 191 A.C.A. 110; *People v. Kilvington*, 104 Cal. 86; *People v. Murphy*, 173 Cal. App. 2d 367.) The weight to be accorded the information possessed by the [fol. 344] officers at the time they made the arrest is for the trial court in the exercise of its sound discretion. (*People v. Fisher*, 184 Cal. App. 2d 308; *People v. Taylor*, 176 Cal. App. 2d 46; *People v. Arter*, 169 Cal. App. 2d 439; *Lorenzen v. Superior Court*, 150 Cal. App. 2d 506). "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*Pompensiero v. Superior Court*, 44 Cal. 2d 178, 183; *People v.*

*Fischer*, 49 Cal. 2d 442; *People v. Ingle*, 53 Cal. 2d 407; *People v. Kilvington*, 104 Cal. 86.)

Deputy Berman, since November, 1959, knew of Ker from "various persons, bits of information," that Ker was possibly securing his marijuana from Murphy and selling it from his residence; since early 1960, Berman knew what Ker looked like, and continued to receive "various bits of information" up to May, 1960. From Black, a reliable informer, Berman, between May and July 27, 1960, received information concerning Ker's activities and trafficking of marijuana and that Ker had purchased from Murphy. The night before the arrest Berman learned that Murphy, known to him as a large-scale marijuana seller, then out on bail in connection with several marijuana offenses, kept his narcotic supply in the oil fields near Fairfax and Slauson; Berman knew of the rendezvous between Murphy, Terrhagen and Cook, Murphy's furtive conduct, the location and time of the meeting and that Murphy had sold Cook one pound of marijuana. Immediately prior to the arrest Berman learned that Murphy in his DeSoto went to the same [fol. 345] bowling alley, passed the same Slauson-Fairfax rendezvous where Ker was seated in his car at approximately the same location near the open fields at which Terrhagen and Cook had waited the night before, drove north on Fairfax into the oil fields in the same direction at about the same time of night, returned to Ker's car in the same fashion, left his automobile and talked to Ker. A check of the license number of the car Ker drove revealed his name and address. Immediately after ascertaining all of this information Berman and several officers proceeded to Ker's apartment where they arrested defendants with 2.2 10ths pounds of marijuana in their possession. Viewing the information in the possession of the officers at the time they entered the premises and arrested defendant, we deem the same to have afforded them sufficient ground for the belief that Ker had just secured marijuana from Murphy and had it in his possession.

While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable inference from what had occurred just prior thereto, the past repute, furtive

conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial evidence destroys any merit to appellants' position that because the officers, by reason of dis- [fol. 346] tance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession.

In *People v. Tahtinen*, 30 Cal. 2d 127, the officers had prior information concerning the seller, Hernandes, but none concerning defendant. Hernandes, through the prior arrests of three persons, was known to the officers as a seller, doing business from his residence; officers saw defendant parked across the street from Hernandes' home, drive off, ride around and repark, walk into Hernandes' driveway, return to the alley, stop and appear to pick up an object at the base of a tree. They arrested him as he drove away and found heroin on his person and in his car. Defendant contended that the officer arrested him without reasonable cause to believe he had committed a felony; said the court: "This contention cannot be sustained. The information obtained from the three persons previously arrested gave the officers reasonable cause to believe the narcotics were being sold by Hernandes at his residence, and defendant's furtive conduct in the vicinity of Hernandes' house gave the officers reasonable cause to believe that defendant had purchased narcotics and had them in his possession." (p. 134). The case at bar is even stronger in that officers here had prior information concerning not only Murphy, the seller, but Ker the defendant.

While Diane Ker had not before been suspect, the evidence discloses something more than her "mere presence at [fol. 347] the scene of a crime." (Ans. B., p. 20). Deputy Berman knew from Black that Ker was selling marijuana at his residence; it could be assumed that if Ker was married, particularly in view of the size of the apartment in which they lived together, that his wife was not entirely without knowledge of his unlawful activities. But more important, her conduct when the officers entered the apartment and her admitted prior occupancy of the kitchen

wherein the marijuana was in plain sight made it obvious to the officers, even before they started their search, that she too was in the process of committing a felony (possession of Marijuana). When the officers walked into the living room, Diane walked from the kitchen where the marijuana lay on the scale in the middle of the drainboard; she said she had been sitting at the table drinking coffee and eating toast; the coffee pot was on the drainboard near the scale and marijuana. This lends little credit to her statement *that she did not look in that direction or know the contraband was there.*

Appellants say that the officers violated Section 844, Penal Code, in entering their apartment without first demanding admittance or explaining the purpose of their visit. Under circumstances such as those at bar, where police officers at a closed door have reason to believe that narcotics are to be had inside of the room and that if they do not enter quietly and or in haste the narcotics will be destroyed by the occupants, they act reasonably when in an effort to surprise them the officers either gain entrance by stealth or force their way in. (*People v. Ramsey*, 157 [fol. 348] Cal. App. 2d 178, *People v. Maddox*, 46 Cal. 2d 301; *People v. Ruiz*, 146 Cal. App. 2d 630; *People v. White*, 167 Cal. App. 2d 794.) No two situations are identical. Each depends, for determination of reasonableness, upon its own facts. (*People v. Williams*, 175 Cal. App. 2d 774.) Depaty Berman's knowledge of Ker's prior activities, his information that Ker was a seller out of his residence and his knowledge of Ker's conduct during the previous hour, that someone was then in the apartment and Ker's car was parked behind the building, were sufficient circumstances to justify the reasonable belief that it was Ker who was in the apartment and that he had then a considerable amount of marijuana in his possession, and that warned in advance of the arrival of police he would have attempted to destroy the same. Quick and quiet police action was warranted; to have announced themselves and or delayed entry, the officers would have provided Ker sufficient time within which to dispose of or destroy the narcotics. It was neither improper nor unreasonable for the officers to enter as they did.

Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount

of marijuana, the officers believing he committed and was committing a felony, entered the premises for the purpose of arresting Ker. As they entered the living room and identified themselves, Mrs. Ker simultaneously walked from the kitchen to the living room at which time Deputy Berman walked several steps to the kitchen door without entering [fol. 349] the kitchen. He saw in plain sight the marijuana on the scales. At this time no search had been made; Deputy Berman observed what was in plain view. (*People v. Roberts*, 182 Cal. App. 2d 431; *People v. Quinn*, 194 A.C.A. 173). The search of the apartment did not take place until defendants had been arrested; a search incidental to lawful arrest is not unlawful. (*People v. Winston*, 46 Cal. 2d 151; *People v. Montano*, 184 Cal. App. 2d 199; *People v. Quinn*, 194 A.C.A. 174.)

In the light of the inpried findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the findings of the marijuana and the subsequent search of defendant's apartment, the recent reference to *Mapp v. Ohio*, — U.S. —, 81 S. Ct. 111, 6 L. Ed. 2d 1081, does not justify a change in our original conclusion.

Deputy Berman disclosed the identity of Black, but as to any other informants, the trial court permitted him to invoke the privilege of non-disclosure (Section 1881.5, Code of Civil Procedure). Thereafter, defendants made no motion to strike Berman's testimony, although they had ample opportunity to do so — after the officer invoked the privilege and before the issue was submitted, colloquy took place between the court and counsel, defendants put on Black as their witness and the motion was argued. "A defendant cannot raise the problem of nondisclosure in the appellate courts when he . . . did not move to strike the testimony on a refusal to disclose, (citations)." (*Priestly v. Superior* [fol. 350] *Court*, 50 Cal. 2d 812, 819.) Appellants argue they are excused from making the motion because it was *then* obvious from the trial court's statement that it would not have been granted. But the record does not bear this out; it shows that the trial court did not make the statement which "revealed its feeling about these informants" (A.O.B., p. 15) until long after the motion could and should have

been made, and after the issue of probable cause had been submitted. It was only then the court stated: "I don't think its upon the—incumbent to furnish the name of the informers and I don't think it would have any real significance as far as their preparing the defense is concerned."

Citing *Priestly v. Superior Court*, 50 Cal. 2d 812, appellants say the trial judge should have required Berman to reveal the names of other informers; we find no error here. The record discloses that the so-called "informants" referred to by appellants actually are the "various persons" who between November, 1959, and May, 1960, gave Berman "various bits of information" that Ker was suspect as selling marijuana he secured from Murphy, out of his home. Even appellants concede "that the officers did not state he was relying upon the information given by others from November, 1959, to May, 1960, in making the search and arrest." (A.O.B., p. 18); and, Berman testified he relied upon the information relayed to him by Sergeants Warthen and Cook, a "mug" picture from the Inglewood Police Department, and information given to him by Black whose full name he revealed. Both Warthen and Berman denied, [fol. 351] and the denial is nowhere controverted, that anyone had ever given them information that at the time of the arrest Ker had marijuana in his possession at his apartment. Nor does the testimony show that any of the "various persons" participated in the crime, were eyewitnesses non-participants, had anything to do with any of the events of July 26 or 27, were even in the vicinity or any of the locations at the times mention in the testimony, were present at the time and place of arrest, had ever pointed out Ker, his auto or his residence to the officers, or had even communicated with the officers since the first of May, 1960. Actually, the officers did not set out on July 27 to arrest Ker, they had no interest in him; their main concern was the "large-scale" seller, Murphy. They "stumbled" onto Ker in the process of their investigation of Murphy, and realizing, from what they knew of Murphy and had just seen occur between him and Ker, that Ker must have had a substantial amount of marijuana in his possession after leaving Murphy at Slauson and Fairfax, decided to arrest him before he was able to dispose of it. We fail to see under the circumstances hereinbefore described how the "bits of

information" obtained from "various persons" so long before the arrest could be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" (*People v. McShann*, 50 Cal. 2d 802, 808); nor can we see any purpose at all useful to the defendants had these persons been brought into court. (*People v. Williams*, 175 [fol. 352] Cal. App. 2d 774.) This situation does not fall within the purview of *Priestly v. Superior Court*, 50 Cal. 2d 813.

Appellants' final contention *does* to the sufficiency of the evidence to prove their dominion and control over the contraband and their knowledge of its presence and narcotic character. The case presents a direct conflict in the evidence. Defendants would have the jury believe they knew nothing about marijuana, that found in the apartment did not belong to them, they did not know it was there and someone must have planted it in their absence that night; but the jury, disbelieving the defendants and their witnesses, as it had the right to do, rejected their defense. (*People v. Stanciell*, 121 Cal. App. 2d 798.) Thus, viewing the evidence in a light most favorable to the respondent, we find numerous incriminating circumstances revealing that the defendants not only knew what marijuana was, but that the marijuana found in their apartment belonged to them.

We refer first to Ker. It is obvious that the officers had no intention of arresting Ker when they started their surveillance of Murphy on the evening of July 27; that it was Ker who met with Murphy was for the most part incidental to what the officers expected to find in an investigation of Murphy; and that Ker knew in advance, if not less the officers, that they would go to Ker's apartment between 9 and 10 p.m. to arrest him. Ker's association with Murphy only an hour before the former's arrest, his furtive meeting with Murphy at night in a fairly deserted location [fol. 353] where the night before Murphy had sold marijuana to Cook after a similar trip into the oil fields, and his conversation with Murphy in a parked car without lights at the side of the road, constituted substantial circumstantial evidence that Ker then and there obtained marijuana from Murphy and thereafter had it in his possession; and this coupled with the presence shortly thereafter of a two-pound brick of marijuana in his kitchen resting on a scale (on

which it obviously had been weighed after its purchase), can leave only one reasonable conclusion—that Ker secured the two-pound brick from Murphy and took it home to weigh it before disposing of it. And, finally, Ker definitely knew about marijuana before—he had admitted to officer Keith in 1957, in the presence of marijuana that had been identified as such, that he had smoked it; Ker had small amounts of marijuana in other places in his apartment—the officers found some in a box on the dresser in defendants' only bedroom and in a sack in the kitchen cupboard; Ker made no denial of possession—he remained silent in the face of the officer's questions in the apartment concerning to whom the marijuana belonged; Ker's answer to Berman's question assumed Ker knew the substance was marijuana and that it belonged to him—Berman after discovering the two-pound brick in the kitchen, asked him if he had "any other narcotics" in the apartment and Ker answered "that he did not"; Ker's lie to the officers when he denied that they owned any other vehicle than the one registered to him; and Ker's doubtful story on the stand [fol. 354] that the marijuana had been planted in his apartment. The circumstances pointing to Mrs. Ker's guilty knowledge are as revealing. Two and two-tenths pounds of marijuana, which would make a large number of cigarettes (Berman testified that one ounce of marijuana yields from 40 to 60 cigarettes), obviously were not for the Kers' own use, thus Ker, as the officers already knew, must have been peddling it from his apartment; it would be difficult to believe Diane Ker, as his wife, living with him in the small apartment, did not know of his unlawful activities therein and did not know the contraband was marijuana. According to her admission to the officers and their testimony, immediately prior to the officer's entry she had been occupying the kitchen and drinking coffee at the table in very close proximity to the marijuana on the scale in plain sight, in fact when the officers entered the living room she walked into it directly from the kitchen. Other circumstances relate to her silence when asked about other small amounts of marijuana found in her apartment, her silence when asked if she owned a car, the discovery of marijuana in two places in a car registered to her, and her ridiculous statement (although she drank coffee in the

kitchen and obviously poured it from a pot standing close to the marijuana on the scales) that she didn't look in that direction and did not know it was there.

On the issue of joint possession the court in *People v. Basco*, 121 Cal. App. 2d 794, stated, "A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for [fol. 355] a finding that there was a joint possession" (p. 796); and to show "knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. (citation)." (*People v. Foster*, 115 Cal. App. 2d 866, 868; *People v. Stancielt*, 121 Cal. App. 2d 798.)

It is clear that the evidence and the reasonable inferences therefrom support the implied finding of the jury that both defendants had knowledge of and a joint dominion and control over the contraband found in their apartment and were thus guilty of possession. (*People v. Bagley*, 133 Cal. App. 2d 481; *People v. Hood*, 150 Cal. App. 2d 497.)

For the foregoing reasons the judgment and order are affirmed.

Lillie, J.

We concur: Wood, P. J., Fourt, J.

[fol. 356] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 357] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

2nd District, Division 1, Crim. No. 7541

PEOPLE

v.

KER, ET AL.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—FILED OCTOBER 25, 1961

Appellants' petition for hearing DENIED.

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Clerk's Certificate to foregoing paper omitted in printing.

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[fol. 358 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 617

GEORGE D. KER, ET AL., Petitioners,

vs.

CALIFORNIA

ORDER ALLOWING CERTIORARI.—January 22, 1962

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

January 22, 1962.

[fol. 359] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 617

GEORGE D. KER, ET AL., Petitioners,

vs.

CALIFORNIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 16, 1962

On Consideration of the motion of the petitioner for leave to proceed further herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

U. S. GOVERNMENT PRINTING OFFICE, 1962 655044 163